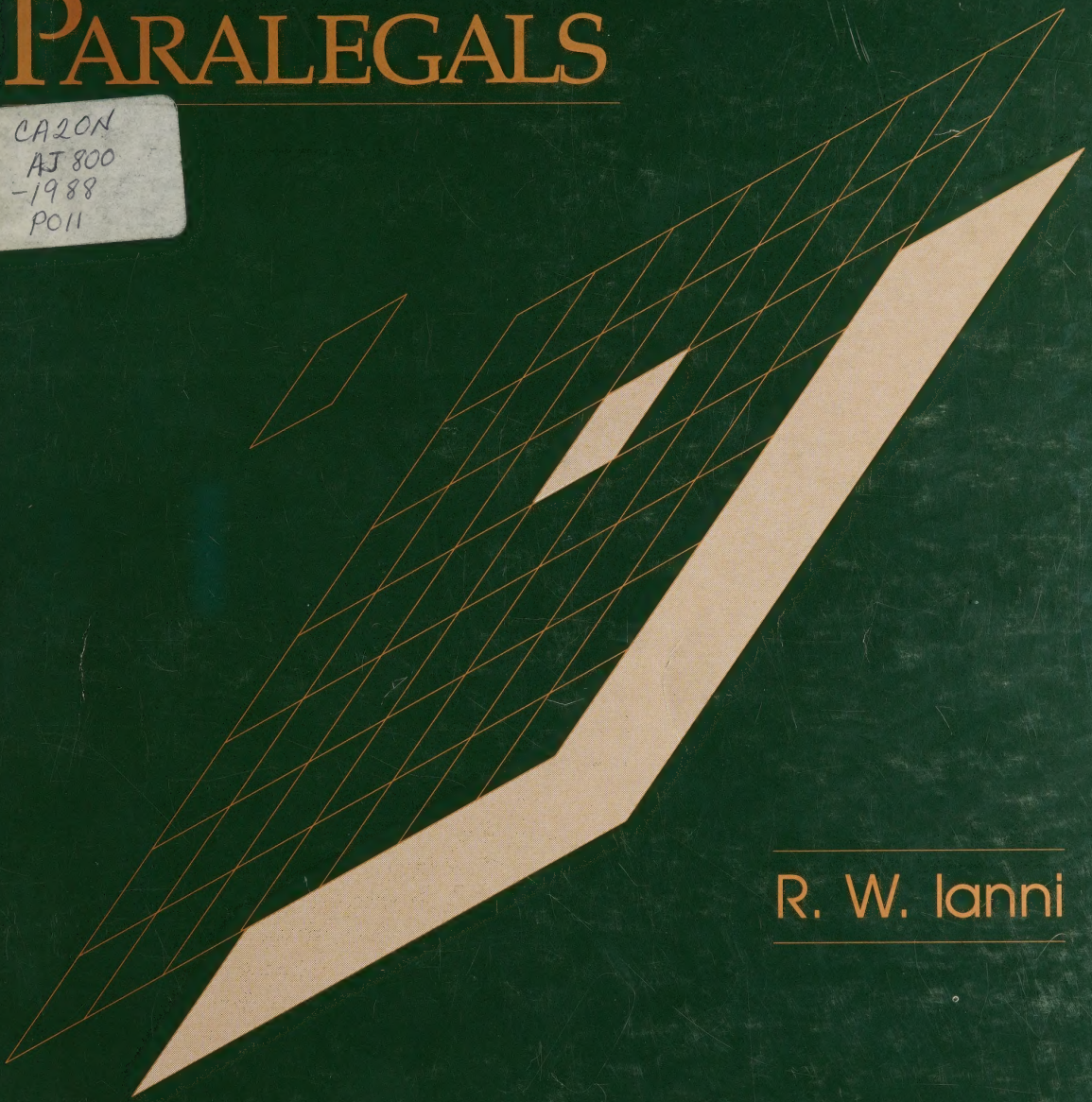
TASK FORCE ON PARALEGALS



R. W. Ianni

Ontario

♦ 1990 ♦

Report Of The Task Force On Paralegals

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September, 1990

The Honourable Ian G. Scott,
Ministry of the Attorney General,
720 Bay Street,
11th Floor,
Toronto, Ontario.
M5G 2K1

Dear Minister:

I am very pleased to submit to you the Report of the Ontario Task Force on Paralegals.

I trust that the research efforts and recommendations will be useful to the Province in addressing the issues set forth in the terms of reference.

Yours sincerely,

Ron W. Ianni

Ron W. Ianni,
Commissioner.

RWI:cw

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ACKNOWLEDGMENTS

Throughout the work of this Task Force it has been my good fortune to have had the invaluable assistance and thoughtful counsel of many individuals from the legal profession and other disciplines, paralegals, law clerks, consumer groups, government personnel and consumers.

Christopher Wydrzynski as Research Director and Dolores Blonde as Secretary/Coordinator deserve very special and pre-eminent recognition. The work of this Task Force could not have been completed without their personal and professional commitment. I have learned a great deal from our association in this enterprise and whatever merits that might be ultimately attributed to this report result from their efforts. Alas, the responsibility for any of its shortcomings or misdirection is mine alone.

Research Consultants who provided valuable expertise in a wide range of topics included: William Bogart, John Flood, Eileen Gillese, Neil Gold, Noel Lyon, Julio Menezes, David Stager, Neil Vidmar, John Wilson, Fred Zemans.

The work of the Task Force was further enhanced by the thoughtful consideration and constructive criticism advanced by the Advisory Committee members who are listed in Appendix E.

I am particularly indebted to all the individuals and organizations who made their views known to the Task Force by submitting written briefs, making presentations at the Public Hearings and by meeting with me and my staff.

A debt of gratitude must be extended to the representatives of the various professional bodies for their consultation in regard to the development of disciplines.

Dr. Edward Ducharme provided inestimable assistance as Editor in the preparation of the Final Report of the Task Force.

Finally, I would like to express my appreciation to the staff of the Royal Commission, Administrative Branch of the Ministry of the Attorney General and in particular Roland d'Abadie, Inge Sardy and Vincenza DeMedicis and to our secretaries, Doreen Bennett and Cindy Wills, for all their helpful assistance throughout this study.

PART I

EXECUTIVE SUMMARY AND RECOMMENDATIONS

EXECUTIVE SUMMARY

This Task Force was assigned a twofold responsibility: to examine the activities of paralegals in the Province of Ontario, and to make specific recommendations regarding their future operations. In pursuit of these objectives, we embarked upon an extensive review of the legal services offered or advertised by non-lawyers, all the while posing at least two overarching questions: Should some or all of these services not be permitted? And, should some or all of these services, if permitted, be regulated?

From the outset, we focused on the activities of "independent" paralegals, whom we defined for the purposes of this study as persons offering legal services to the public for a fee, although they are not members of the Law Society of Upper Canada and do not carry on business under the authority or supervision of lawyers. As a point of departure, we began by formulating what we considered to be the key issues relating to the current and future practices of Ontario's independent paralegals. These issues, ten in all, are enumerated in Part II, Chapter 1; their purpose was to serve as significant points of reference around which we could systematically and

coherently assess not only the kinds but also the implications of the activities performed by independent paralegals including the responses of Ontario's consumers to the delivery of these services. As a result of our lengthy investigation we have now come to know a great deal about paralegal activities which have been perceived for so long and by so many, including some paralegals, as marginal or "underground".

Because paralegals in Ontario are currently unregulated, we initially experienced difficulty in gathering concrete, reliable data. However, given the time we have devoted to our task and the depth and breadth of our study, we now believe that we have acquired more than enough information to say with some measure of confidence what independent paralegals do in this province and how their services should be controlled and regulated. In Part II, Chapter 1, we elaborate at length on the specific initiatives we undertook to gather our data.

We consulted extensively with a whole host of individuals and organizations. We also conducted seven Public Hearings across the province and received over seventy written submissions. In addition, the Commissioner travelled extensively in the province, explaining the role of the Task Force to various interested individuals and organizations. We also collected a great deal of data from other jurisdictions in Canada and the United States and, with this information, assessed the distinguishing features of Ontario's experience with independent paralegals. We also undertook two comprehensive interdisciplinary consultations with representatives of sixteen non-legal professions and sub-professions, seeking to establish relevant points of comparison and contrast.

The Commissioner also established an Advisory Committee of twenty-one members, each representing a constituency with a special interest in the work of the Task Force. The Task Force commissioned as well a series of research papers from known experts in the field. The experts constituted, in effect, a research team. At our request, two members of the research team carried out a major empirical study into the current operations of Ontario's independent paralegals and of the impact of those operations on the public. This study, a summary of which is included in Appendix F to this Report, provides the only statistically reliable information to date on the services rendered by Ontario's independent paralegals and the public's perceptions of those services.

When, in 1986, the Court of Appeal for Ontario held in a case commonly referred to as the POINTTS[1] decision that a person appearing as an agent need not be a lawyer, the operations and indeed the status of independent paralegals in this province changed dramatically. The ruling of the court in POINTTS in effect legalized the activities of independent paralegals engaged in agency work. Although the decision went no further, it was widely (and incorrectly) interpreted as sanctioning a whole spectrum of activities performed by independent paralegals. Not surprisingly, the Law Society of Upper Canada, whose responsibility it is to prosecute parties for unauthorized practices, began to investigate and to charge independent paralegals who performed services not directly related to those approved by

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[1] *Regina* v. *Lawrie and POINTTS Ltd.* (1987), 32 C.C.C. (3d) 549 (Ont. C.A.). "POINTTS" is an acronym meaning "Provincial Offenses Information and Traffic Ticket Service". POINTTS Limited is an independent paralegal firm established by Mr. Brian Lawrie, a former Toronto police officer.

the Court in the POINTTS case. At approximately the same time, a new Bill (Bill 42) was introduced into the Ontario legislature, the purpose of which was the regulation of independent paralegals. The Bill was not enacted.

In this uncertain, unregulated environment we encountered some initial difficulty in gathering information from some independent paralegals who preferred not to discuss their activities. Nonetheless, we have discovered that approximately 750 independent paralegals presently offer legal services in Ontario. Their activities are expanding and their services have largely been approved by the public.

A good deal of evidence also exists, however, to suggest that Ontario's independent paralegals are neither well nor consistently trained to provide the legal services which they offer to the public. The matter of their formal education is thus, for us at least, a matter of seminal importance. Most current paralegals possess little legal education. For the most part, their knowledge and skill to provide paralegal services derive from practical experiences. So, the retired police officer feels competent to appear as an agent in relation to traffic offences under the *Provincial Offences Act* because he has devoted considerable time as a police officer in and around traffic court becoming wholly familiar with its processes. But the same officer may not have taken a single course in law. As our investigation developed, we considered it important to decide whether or not some education and training, or its equivalent, ought to be required of everyone who wants to be, or wants to continue to be, an independent paralegal in Ontario. Ultimately, we have concluded that a mandatory educational and training program, or its equivalent, must be a prerequisite to practise in this field.

The mandatory program of study which we recommend is a two-year program to be offered at and by the Community Colleges. We think that the program can be neatly and inexpensively meshed, with appropriate modifications, with existing law clerks' courses and programs. While a formal educational program cannot guarantee competence in the delivery of paralegal services any more than legal training guarantees the competence of lawyers, it ought to provide some measure of protection for the public. In this context it is worth noting that, according to our empirical study, most consumers of legal services in Ontario believe that independent paralegals already deliver their services with an acceptable level of competence. Complaints about incompetent or fraudulent practices have been few. Nevertheless, in our view, the imposition of a mandatory education and training component should be helpful in reinforcing even further the public's confidence in the limited range of legal services we propose to allow independent paralegals to provide.

Our study reveals that the public currently retains the services of independent paralegals for many reasons, chief among which is the relative cost of the services. Many consumers believe that independent paralegals provide comparable or similar services to lawyers at less cost. Our comparison of the fees levied by lawyers and non-lawyers for relatively similar services suggests that the public's perception is generally accurate. Another reason why some consumers prefer to retain independent paralegals in the place of lawyers appears to be related to a generalized perception of lawyers and law firms as aloof or forbidding. For this reason some members of the public are reticent to retain lawyers for what they consider to be minor matters. Hence the current demand for a "no-frills" kind of legal service especially in relation

to matters which the public considers to be uncomplicated, routine, and of low risk.

Our study has produced a wealth of information on the activities of independent paralegals in this province and on the response to those activities within the legal community and the province at large. On the basis of this information, we conclude that independent paralegals should be allowed to deliver a limited range of legal services within a newly regulated environment. We have arrived at this conclusion guided by two fundamental goals: to increase access to legal services and to provide adequate protection for consumers who utilize such services. The specific services and the nature of the regulatory model proposed herein are set out in summary fashion in the following recommendations.

RECOMMENDATIONS

REGULATION OF INDEPENDENT PARALEGALS IN ONTARIO

The Task Force recommends that:

Recommendation 1 Independent paralegals should be subject to regulation.

Recommendation 2 The regulatory model chosen for independent paralegals should be the least intrusive necessary, consistent with the public's need for greater access to legal services as well as for some protection against possible abuses in the delivery of those services.

Recommendation 3 All current and future independent paralegals should be required to register with the government as a pre-condition to practising in Ontario.

Recommendation 4 The government should appoint a Registrar of Independent Paralegals.

Recommendation 5 The Registrar should be empowered to formulate Rules of Practice for the independent paralegals and to otherwise monitor and control independent paralegal activities.

Recommendation 6 Individuals should be permitted to become independent paralegals on the following terms:

- that they are of good character;
- that they register with the Registrar of Independent Paralegals;
- that they pay a fee or fees related to the area or areas of practice they wish to pursue;
- that they abide by the rules of practice established by the Registrar; and
- that they complete a course of study comprised of two years at a Community College or its equivalent in terms of related education or practice.

Recommendation 7 The Office of the Registrar of Independent Paralegals should be located within the administrative structure of the Ministry of Consumer and Commercial Relations.

Recommendation 8 The Registrar of Independent Paralegals should be provided with the assistance of an Advisory Panel composed of a member of the Law Society, an independent paralegal, a representative from the Office of the Attorney General, and a law professor.

THE EDUCATION AND TRAINING OF INDEPENDENT PARALEGALS

Recommendation 9 An educational and training program or its equivalent should be required as a precondition for registration as an independent paralegal in Ontario.

Recommendation 10 The educational and training program should be a two-year program under the auspices of the Community Colleges.

Recommendation 11 The curriculum of the mandatory two-year program should be structured by those responsible for the design of the existing law clerks' curriculum in conjunction with the Registrar of Independent Paralegals and the Registrar's Advisory Panel.

Recommendation 12 Independent paralegals currently practising in Ontario and seeking exemption from the mandatory two-year program of study should

be made to satisfy the Registrar of Independent Paralegals of their qualifications to carry on business in one or more of the permissible areas of practice.

Recommendation 13

Individuals seeking to register as independent paralegals prior to the implementation of the mandatory two-year program of study should be made to satisfy the Registrar of Independent Paralegals of their qualifications to carry on business in one or more of the permissible areas of practice.

Recommendation 14

The Registrar of Independent Paralegals should be asked to develop and implement educational and field-related equivalencies for determining the permissible areas of practice for independent paralegals currently practising in Ontario or for individuals seeking to become independent paralegals before the implementation of the educational and training program.

Recommendation 15

In addition to the mandatory two-year educational and training program, continuing educational opportunities for independent paralegals should be implemented, particularly in the area of skills development.

THE AREAS OF PERMISSIBLE PRACTICE

Recommendation 16

The regulatory system developed and implemented for the purpose of governing independent paralegal practice in Ontario should be such as to stipulate clearly the permitted rather than the proscribed areas of practice.

Recommendation 17

The regulatory system should include an express directive to independent paralegals:

a) to refrain from offering any advice or service in respect of areas of practice not permitted by regulation; and

b) to refer all enquiries relating to areas outside of those areas of permitted practice to members of the legal profession.

Recommendation 18

Independent paralegals, duly qualified to practise in Ontario, should be allowed to register in one or both of two registration streams:

- as court agents permitted to appear before particular courts and administrative tribunals;

- as legal assistants in specifically defined non-agency matters.

Recommendation 19

Independent paralegals registered as court agents should be allowed to practise in the following areas:

a) representations in respect of proceedings under the *Provincial Offences Act* and summary conviction offences under the *Criminal Code;*

b) representations in Small Claims Court;

c) representations before all Ontario administrative agencies or tribunals which currently allow independent paralegals to appear, either by law or by practice;

d) representations and consultations in respect of immigration law matters;

e) representations and consultations in landlord and tenant matters relating to residential tenancies.

Recommendation 20

Independent paralegals registered as legal assistants should be allowed to practise in any one or more of the following areas:

a) applications for changes of name;

b) applications for criminal pardons;

c) preparation of documents necessary to effect powers of attorney;

d) preparation of simple wills, provided that the beneficiaries are family members or friends and that the property to be distributed includes some or all of the following, but nothing more: home(s); clothing, furniture, and other personal effects; bank account(s); and insurance policies;

e) preparation and filing of documents relating to uncontested divorce petitions, provided that in each case the parties to the petition have availed themselves of independent legal advice prior to the institution of the divorce proceedings;

f) incorporations of small businesses, subject to the five specific restrictions elaborated in Part II, Chapter 5.

Recommendation 21 Independent paralegals should be given the authority to commission sworn affidavits and other legal documents related to the areas of practice for which they have registered.

DISCIPLINE AND CONSUMER PROTECTION

Recommendation 22 The Registrar of Independent Paralegals should be required to provide information to the public about the activities of independent paralegals in Ontario's legal service delivery system.

Recommendation 23 A standard-form retainer should be developed for use by all independent paralegals, and the standard-form retainer should include:

a) a written release statement indicating that the service is not being provided by a lawyer;

b) a written summary statement of the independent paralegal's background and qualifications to perform the service.

Recommendation 24 Disciplinary procedures should be established to apply to independent paralegals who transgress any of the conditions of their registration.

Recommendation 25 Consumers should be accorded the option of taking to binding arbitration unresolved complaints about the quality of service rendered by independent paralegals.

Recommendation 26 The Registrar of Independent Paralegals should be granted specific authority to deal with

ongoing dishonest or fraudulent practices either through the exercise of regulatory powers or by the use of specially created statutory offences.

Recommendation 27 For each registration stream a compensation fund should be established for the benefit of consumers victimized by unethical or unlawful practices.

OTHER ISSUES RELATED TO THE ACTIVITIES OF INDEPENDENT PARALEGALS

Recommendation 28 Independent paralegals should be allowed to continue to advertise the availability and costs of their services to the public.

Recommendation 29 Franchising should be continued as an acceptable mode of delivery of independent paralegal services, subject to any controls the Registrar of Independent Paralegals may see fit to impose upon such franchises in the future.

Recommendation 30 The regulatory model proposed herein should receive a comprehensive review and evaluation after a three- to five-year period to review the operation of the regulatory model and to determine what modifications might be necessary.

PART II

THE REPORT

1 INTRODUCTION

THE APPOINTMENT OF THE TASK FORCE

In July, 1988, the Honourable Ian Scott, Attorney General of Ontario, announced the organization of the Ontario Task Force on Paralegals to report to him on the activities of paralegals in the province and to make recommendations to the government on their future operations. The immediate impetus for the decision to create the Task Force was the concern expressed by a number of interested parties that "unqualified" persons, that is, persons not formally admitted to the practice of law by the Law Society of Upper Canada, were offering a variety of legal services to the public. The Attorney General wanted to know the nature and extent of the legal services provided by non-lawyers and to what degree, if any, such services ought to be regulated, controlled, or curtailed.

Dr. Ron Ianni, President of the University of Windsor, was appointed sole Commissioner responsible for the submission of the Report of the Task Force. Dr. Ianni, in turn, engaged Christopher Wydrzynski, Professor of Law

at the University of Windsor, as Research Director and Dolores Blonde as Task Force Secretary to assist him directly in the compilation of data and in the preparation of this final Report.

DEFINITION OF "PARALEGAL"

INDEPENDENT PARALEGALS

For the purposes of this study, the Task Force has defined a paralegal as one who:

1. is not a member of the Law Society of Upper Canada;

2. offers particular types of legal services to the public for a fee; and

3. is not supervised by a qualified legal practitioner.

In other words, the focus of this Report is the *independent* paralegal in Ontario, the individual who has direct contact with the public and whose activities, to this point, have been unregulated by a specific statutory mechanism.

SUPERVISED PARALEGALS

The Task Force recognizes, of course, that a number of individuals, including law clerks and provincial prosecutors, presently function as "supervised" or "dependent" paralegals responsible directly to lawyers in private firms, in community legal clinics, and in various governmental offices. In these circumstances, supervised paralegals have performed a variety of legal services successfully for many years. Indeed, without their assistance, many law firms could not continue to provide a broad range of quality legal services to the public. Supervised paralegals and their operations

are not central to this Report. Their supervision, training, and control by members of the established legal community have not been controversial, although such paralegals have lobbied for many years for greater recognition of their status in the legal community.

ISSUES RELATED TO THE TERMS OF REFERENCE

The Task Force has undertaken a comprehensive review of the activities of unsupervised or independent paralegals guided by ten key issues:

1. the nature and kinds of services presently provided by independent paralegals in Ontario;

2. the current level of consumer demand for and satisfaction with such services;

3. the amount of regulation and control, if any, that should be imposed upon independent paralegals, if they are allowed to continue offering services directly to the public;

4. the nature and kind of legal sanctions, if any, necessary to protect consumers against fraudulent or incompetent independent paralegals;

5. the involvement, if any, of the government or the Law Society, or both, in the ongoing regulation of independent paralegals;

6. the type of registration, certification or licensure, if any,

appropriate to or necessary for the governance of independent paralegal activity;

7. the personal and educational prerequisites, if any, required by independent paralegals as conditions to practise;

8. the ethical standards and/or disciplinary procedures, if any, necessary to guide the activities of independent paralegals;

9. the source and nature of the education and training provided to independent paralegals, and the continuing education, if any, required by those already in the field; and

10. the specific activities or areas of law available for practice by independent paralegals.

The Report of the Task Force is, we believe, a measured response to all of the information gathered in relation to these issues underlying our general terms of reference. They represent, in fact, the framework within which we have focused our attention and arrived at our specific recommendations.

From the beginning, however, we have known that the task to which we have set ourselves would be complicated as well as controversial. We understood that it would not be easy to recommend any alternative method of legal service delivery to the public even if our research persuaded us that an alternative was desirable or necessary. The Law Society of Upper Canada

as the governing body of lawyers in this province plays the dominant role in determining the manner in which legal services are provided. We also understood the historical resistance to any change in a system as deeply entrenched as the system of legal services in Ontario.

Most importantly, we were aware from the outset that very few verifiable facts were known about independent paralegals in Ontario, and that the data necessary to make enlightened judgments about their role in delivering legal services would not be readily available. The main reason is that until now the independent paralegal industry has functioned as a sort of "black market", and in the past even those practising within the group have been reluctant to report openly and in detail about their operations, for fear of prosecution by the Law Society. For these reasons, we undertook some extensive research, attempting to find and to assimilate information on independent paralegals from as many reliable sources as possible. The process of our search and the sources of our data are set out below.

THE WORK OF THE TASK FORCE AND SOURCES OF INFORMATION

CONSULTATIONS

The Task Force gathered information about independent paralegals from a variety of sources inside and outside the legal community and across the province. We consulted extensively with many individuals and organizations including lawyers, independent paralegals, independent and government researchers, and the original sponsors of Bill 42. (A complete list of these consultations is provided in Appendix A.) We also conducted public hearings in London, Ottawa, St. Catharines, Sudbury, Thunder Bay, Timmins, and Toronto, and received numerous formal written and oral

submissions including those from the Law Society of Upper Canada, The Ontario Branch of the Canadian Bar Association, and the Institute of Law Clerks of Ontario.

PUBLIC HEARINGS

Prior to the public hearings in the seven Ontario cities, the Task Force published and circulated a paper entitled "Issues for Discussion" (see Appendix B) to stimulate public interest in the subject and to provide for focused presentations and discussions. The strategy worked well; the public hearings were well attended and exceedingly informative. (A complete list of the participants at the public hearings is contained in Appendix C.)

WRITTEN SUBMISSIONS

From the outset, the Task Force sought to make clear to the public its interest in receiving all opinions, positive or negative, on the provision and control of legal services by independent paralegals. In addition to visiting the seven cities, we placed advertisements in various newspapers across the province and called for written submissions from the public. The Task Force received over seventy submissions by this means. (A complete list of the written submissions received by the Task Force is provided in Appendix D.) The submissions form a wide body of opinion, from the personal experiences of paralegals themselves to scholarly analyses of the implications of independent paralegal activity generally, and proved to be enormously helpful.

ADVISORY COMMITTEE

In the Fall of 1988, at the same time as the formal call for submissions from the public, the Commissioner of the Task Force established an Advisory Committee consisting of twenty-one representatives of the groups likely to be most directly affected by the decisions of the Task Force. The Advisory Committee included, among others, lawyers (including the Treasurer of the

Law Society of Upper Canada), independent paralegals, a member of the judiciary, legal educators, a union representative, an economist, government regulators, the President of the Consumers Association of Canada (Ontario), and a lay bencher of the Law Society of Upper Canada. (A complete list of the members of the Advisory Committee is provided in Appendix E.) This body met a number of times and although its role was advisory only, it provided valuable information to assist the Task Force in its work. The Commissioner is grateful for and has drawn extensively upon the views expressed by many members of the Advisory Committee, but he alone is responsible for the contents of this Report. The Report is not to be understood as representing a consensus of views of the Advisory Committee.

Also in the Fall of 1988, the Commissioner accepted invitations from a number of organizations to explain the role of the Task Force. These organizations included the Paralegal Association of Ontario, the Ontario Provincial Prosecutors Association, and members of the POINTTS group. In the Spring of 1989, he addressed a Symposium on the subject of independent paralegals at Durham College in Oshawa.

OTHER JURISDICTIONS

The Task Force also assembled an extensive collection of data from other jurisdictions where issues relating to independent paralegals are under active review. We consulted at length with representatives of the Law Society of British Columbia, which has recently created a Committee to examine the issue of independent paralegals in that province, and with representatives of the California State Bar Association where a review process similar to our own has also recently been undertaken. To some extent, knowledge of the experiences of others has guided our thinking about what could or should be attempted in Ontario, but we also recognize

that the development of the independent paralegal profession in Ontario has been at once unique and extensive.

OTHER PROFESSIONS

We also wanted to learn about the experiences of other Ontario professions and sub-professions in which similar trends were discernible. We organized two extensive interdisciplinary consultations with representatives from sixteen of these professions and sub-professions. These were most illuminating; our representative sample revealed without exception that the monopoly status of a single body or organization within each profession evolved over time to accommodate "sub" or "paraprofessional" groups. The consultations also revealed that, at least initially, acceptance of a sub-discipline or group within any profession is a gradual process, although in time the acquired knowledge and practical experiences of individuals within the sub-discipline or group are eventually recognized.

COMMISSIONED RESEARCH

The Task Force also commissioned research papers from a number of experts interested in and knowledgeable about the activities of independent paralegals in Ontario. The researchers functioned, in effect, as a team, meeting periodically to discuss their findings and to develop consistent approaches to the issues. (A complete list of the researchers and their topics as well as summaries of their research are provided in Appendix F.) With the notable exception of a major empirical study of the independent paralegal industry in Ontario, the research is generally speculative and theoretical because Ontario's independent paralegals are not a homogeneous body and therefore difficult to characterize: their activities are varied and changeable and subject to virtually no regulation other than the general restrictions on unauthorized practice.

When we began our study, we had no precise empirical data on the number of individuals practising as independent paralegals in Ontario or on the scope of their activities. The Task Force established as one of its first priorities the collection of such data. We therefore commissioned an empirical research study into the current operations of Ontario's independent paralegals, gathering information from any and all available sources, but most importantly from the clients of independent paralegals and from independent paralegals themselves. This study provides the only reliable and comprehensive information to date on the activities of the independent paralegals in Ontario.

The Task Force also directed its researchers to analyze various regulatory options available for independent paralegals, the issue of their education and training, and the impact of prosecutions of independent paralegals for unauthorized practice. We commissioned a study of the economic impact of independent paralegals upon the marketplace and an analysis of the constitutional implications of independent paralegal activity. The Task Force investigated as well the issue of insurance and other public safeguards for those using independent paralegal services and the role of independent paralegals in real estate transactions. In short, the Task Force is confident that in carrying out its mandate it has canvassed its subject exhaustively within the context of the issues framed by the terms of reference.

The amount of information we have assembled in support of our recommendations is considerable, the materials being but one measure of the complexity of the range of issues raised by the activities of independent paralegals in Ontario. Having now received and examined the data, we believe that the current problems associated with independent paralegal activity are not insurmountable, and that creative, progressive solutions are

possible. These solutions, moreover, should have the effect of ensuring at once greater access to legal services and greater protection of the public interest. These objectives — greater access and protection of the public — underlie and are the governing rationale for all that follows.

2

THE SCOPE OF PRACTICE OF INDEPENDENT PARALEGALS IN ONTARIO

THE HISTORICAL CONTEXT

Although the growth of the independent paralegal profession in Ontario is thought to be a fairly recent development, the impetus for such activity probably began as early as the mid-1960's with the introduction of legal aid. Legal aid was at once the cause and effect of changing consumer demands and expectations. It signified greater access to legal services for the citizens of Ontario and marked a subtle change in the nature of the monopoly of the practising bar and its governing body, the Law Society of Upper Canada, over the market for legal services. Perhaps a few observations might be made in passing about the nature of that monopoly.

THE LAW SOCIETY

Surely one reason for granting practising lawyers the privilege of self-governance by means of an organization such as the Law Society of Upper Canada was to ensure their freedom from governmental influence. A second reason was to allow the profession itself to establish and maintain appropriate standards of competence and professional, ethical conduct. In return for that privilege, the Law Society is obliged, morally and statutorily, to govern that

monopoly in "the public interest". The Law Society has always determined the manner in which the legal profession provides legal services to the public and through what channels those services are to be offered. In the past, it has tended to react cautiously to proposals for change in the delivery of legal services, upholding the status quo on the basis that it best served both the public interest and the interest of the profession.

There is nothing wrong with some group or agency espousing the interests of the practising bar or of any other professional group for that matter. For example, an organization such as the Canadian Bar Association can and should promote the interests of the legal profession. However, the role of the Law Society is clearly not the same, although this differentiation has not always been clearly evident, since it is the one body which by statute is responsible for the protection of the public interest. Accordingly, its response to societal changes or consumer needs must be judged in this context.

Informed observers agree that the Law Society is more responsive today to consumers' interests and needs than at any point in its history. However, these observers have been critical of the position taken by the Law Society in the past on such issues as expansion of legal aid to community-based legal clinics, lawyers' advertising and the publication of fees, specialization, mediation services, and prepaid legal services.

It is worth emphasizing that the Law Society's policies respecting the delivery of legal services and, indeed, all aspects of the profession are formulated and implemented by elected Benchers, virtually all of whom are members of the practising bar. Among the group are some of the most well-

known and respected lawyers in Ontario, lawyers who could not have earned their renown within the profession and in the eyes of the public without being sensitive to the public's interests and concerns. But traditionally the Benchers have not been considered as a motivating force for innovation and change.

All this, the Task Force believes, helps to contextualize the Law Society's stance regarding certain activities of independent paralegals in Ontario. Indeed, in the public's interest, the Society has expended considerable time and effort prosecuting independent paralegals for the "unauthorized practice" of law. In our view, however, the public's interest will not be ensured by prosecutions alone. Expanded access to legal services is also in the public's interest. The question is whether or not access to legal services can be improved by the existence of independent paralegals and, if so, by what means their operations can be circumscribed and controlled. In this way, the "public interest" is fully understood.

ACCESS TO LEGAL SERVICES

The ability to participate in the legal system and to benefit fully from legal rights and privileges depends, of course, on the accessibility of that system. Access to the legal system is dependent in large measure on the availability of legal services within the system. And, in general, the more a service is regulated or controlled the less accessible it tends to become. In our view, one of the critical factors to be considered before prohibiting the delivery of legal services through non-traditional means must be the potential for harm to the public. Without access to legal services, full and meaningful participation in a democratic society is illusory.

THE RULE OF LAW

An even more fundamental basis for guaranteeing access to legal services is the elemental concept of the "rule of law". Basic to our Canadian democracy is the notion that we are a society governed by laws. For this idea to be meaningful the laws must be knowable, that is, accessible to the people governed by them. It is arguable, in fact, that the "fundamental justice" guaranteed in section 7 of the *Canadian Charter of Rights and Freedoms* implies the right of individuals to reasonable access to law in a free and democratic society governed by the rule of law. All Canadians have the right to know the law or to represent themselves before the courts, but in reality most require assistance in coping with the complexity of the legal and judicial processes.

Access to law may be enhanced by any number of means, including, for example, the revision and simplification of the language of law or the provision of appropriate funding for public interest advocacy. In a society ordered by law, the issue of the delivery of legal services is one bound to be the subject of ongoing review and discussion. An important, and overlooked, element in the examination of this issue is a survey of legal needs. We are convinced that a legal needs survey in Canada is long overdue. In any event, the specific question to be addressed here is whether or not the activities of independent paralegals, properly regulated, can contribute to, not erode, the public's interest in gaining greater access to law.

THE CURRENT ENVIRONMENT

a) Introduction

The Task Force has studied Ontario's independent paralegals for more than a year, gathering information and points of view from a number of sources. On the basis of these sources and our research we are confident that our description of the current legal services marketplace in Ontario is reliable and valid. Our research, including the empirical study of independent paralegals in Ontario, has allowed us to formulate some overall impressions about the public's attitudes toward the legal system:

1. The public is not entirely satisfied with the present legal service delivery system;

2. The public needs and wants more information about how the system operates and for whom;

3. The public wishes to participate in the legal system;

4. The public wishes to participate meaningfully in the processes of government.

Our research also reveals that the public's interest in the services rendered by paralegals is increasing as a function of its need to feel more involved in legal and governmental processes. Thus, today what we see is a fluid, volatile market for innovative, entrepreneurial legal services beyond those already offered in the traditional context. The increase in volume and kinds of activity by independent paralegals in recent days is a predictable consequence of the accelerating demand by consumers for more and more varied legal services at affordable costs. The actual and potential impact of

independent paralegals on the public and the legal profession must be measured in light of these palpable changes in the marketplace.

POINTTS DECISION

Until a few years ago, the work of independent paralegal firms was relatively uncontroversial, consisting of such activities as title searches or investigations, usually on behalf of law firms. Independent paralegals had little or no direct contact with individual clients. Then came the decision of the Court of Appeal for Ontario in POINTTS[1] and with that decision the status (and stature) of the independent paralegal in this province changed.

POINTTS is the name of an independent paralegal firm formed in Toronto by Mr. Brian Lawrie, a former police officer with more than ten years' experience on the Toronto police force. For the most part, the firm restricted its practice to agency work on behalf of individuals charged with minor traffic offences under the Ontario *Highway Traffic Act*. As business increased, Mr. Lawrie began to sell franchises throughout Ontario, but only to former police officers with experience in law enforcement comparable to his own. The Law Society prosecuted the organization, alleging "unauthorized practice" contrary to section 50 of the *Law Society Act* [2].

Following a lengthy historical analysis, the Court of Appeal for Ontario held that the meaning of the word "agent" in various Ontario statutes should be interpreted to allow non-lawyers to represent individual clients before a

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[1] *Regina* v. *Lawrie and POINTTS Ltd.* (1987), 32 C.C.C. (3d) 549 (Ont. C.A.).

[2] *Law Society Act*, R.S.O. 1980, c. 233, as am. Subsections 50 (1) and (2) of the Act provide as follows:

50 (1) Except where otherwise provided by law, no person, other than a member whose rights and privileges are not suspended, shall act as a barrister or solicitor or hold himself out as or represent himself to be a barrister or solicitor or practise as a barrister or solicitor.

(2) Every person who contravenes any provision of subsection (1) is guilty of an offence and on conviction is liable to a fine of not more than $1,000.00.

number of named courts and tribunals in the province, and to be remunerated for their services. (A list of these statutes is provided in Appendix G.) It was not valid, therefore, to prosecute independent paralegals pursuant to section 50 of the *Law Society Act* as unauthorized persons engaged in the practice of law, when those persons were merely acting in the capacity of agent within the framework of certain statutes. Near the end of the judgment in POINTTS, the Court acknowledged the significance of its decision especially in light of the fact that such agents were not subject to any specific regulatory regime. The Court suggested that the Ontario Legislature consider enacting suitable controls. To that end, the Attorney General moved promptly to create this Task Force and to await our recommendations especially in respect of regulation and control.

Properly interpreted, the POINTTS decision confined the work of independent paralegals to agency representation before various courts and tribunals; the Court was not required to and did not address other types of legal services, many of which were also being provided to consumers by independent paralegals. In the immediate aftermath, however, the media and many people involved in the independent paralegal business took heart from the decision and interpreted it liberally as opening the door for the legitimation of many other types of legal services by independent paralegals, including, for example, family law matters, simple business incorporations, and simple wills.

What followed was a substantial increase in the numbers of independent paralegals in Ontario and a corresponding increase in prosecutions by the Law Society for the unauthorized practice of law. From January, 1986 to March, 1989 there were 26 prosecutions for unauthorized practice. Only 11

files were opened in 1986, while 48 were opened in 1988, and as of March, 1989 there were 24 prosecutions pending all across the province. Despite this increased vigilance by the Law Society, the number of independent paralegals in the province has increased, and they have continued to provide a wide spectrum of legal services to the public.

BILL 42

Another development arising out of the Court of Appeal decision in POINTTS was the presentation of Bill 42, entitled the *Paralegal Agents Act, 1986*. Introduced into the Legislative Assembly on May 22, 1986, this Bill was an attempt to provide for the regulation of independent paralegals permitted to act as agents pursuant to the POINTTS decision. The regulation proposed was to be largely under the auspices of the Law Society, and the areas of permissible legal services were to be confined to those expressly dealt with by the Court of Appeal in the POINTTS case. Although the Bill was not enacted, it offered a legislative solution, albeit limited in focus, as one method of dealing with the problem of regulating and controlling independent paralegal activity, and it galvanized the interests of many individuals and groups to begin a serious examination of the issues.

b) The Number of Independent Paralegals in Ontario

Because independent paralegals presently carry on business without formal regulation or control, the Task Force has not been able to rely on any one source to determine their precise number at this time. Our field research indicates, however, that there are as many as 750 practising independent paralegals in Ontario and that the number is growing. Their greatest concentration is to be found, naturally, in the large urban centres, particularly Toronto, Ottawa, Hamilton and St. Catharines. However, independent

paralegals appear to be active in most or all municipalities in the province, including the judicial districts of Northern Ontario. Independent paralegals enter and leave the business, their number constantly changing, but it seems clear that they have now come to play a significant role in the delivery of alternative legal services in Ontario.

c) The Activities of Independent Paralegals

Independent paralegals perform a wide range of legal services in an apparently expanding market. These activities include, in no particular order of frequency:

- uncontested divorces, and other matters relating to family law such as name changes and stepparent adoptions;
- Small Claims Court representations and debt collections;
- simple wills;
- powers of attorney;
- simple incorporations;
- debt counselling;
- representations in respect of *Highway Traffic Act* and other provincial offences;
- representations in respect of summary conviction offences under the *Criminal Code;*

- bail hearings;
- workers' compensation applications;
- immigration matters;
- representations before a variety of administrative tribunals including those having responsibility for social assistance, unemployment insurance, etc.;
- real estate matters;
- landlord and tenant disputes, including rent review applications;
- pardons for criminal offences; and
- general assistance in the filling out and filing of government documents and other forms.

The greatest concentration of independent paralegal activity remains in what are often thought to be the rather more routine, less complicated areas of legal service such as agency representations relating to *Highway Traffic Act* offences. But at least some of the independent paralegals' work involves highly complex statutory regimes. Many independent paralegals prefer to specialize, concentrating their services in from one to three specific types of activities. Very few could be described as generalists. On the whole, our research suggests that the range of services provided by independent paralegals is broad and expanding, and that these services have generally been accepted and approved by the public who regard them as a viable option to those traditionally provided by lawyers.

d) The Background and Training of Independent Paralegals

Our investigation into the background and training of independent paralegals reveals a great variation in their formal legal and non-legal education as well as their prior employment experiences. This is not surprising given that there is presently no formal training or educational process by which individuals can qualify to become independent paralegals. Most of them simply become involved with legal services after acquiring some knowledge about a particular area of law, either through experience in a related field, such as business or law enforcement, or through some personal contact with the legal process which has stimulated their interest.

Very few independent paralegals have any formal education in law, although some have taken university and community college legal education courses. Still others — a significant minority — have foreign law degrees and/or professional legal practice not recognized in Ontario. Some among this group are disbarred Ontario lawyers. A few were once legal secretaries and law clerks with formal community college training who decided to discontinue their affiliation with law firms and to operate independently.

In stark contrast to lawyers, most independent paralegals have had little or no formal study of the law prior to practice. Most of their learning is informal, either by direct, first-hand experience of the processes of law or by the reading of legal texts and manuals. All of the franchise operations offer in-house training programs and written legal materials to their franchisees, but neither the programs nor the materials can be considered to be of high calibre. Some franchisees, in fact, have complained to members of the Task Force about the overall inadequacy of the training they received from one of the franchisors.

Most of the independent paralegals appear to be aware of and concerned about deficiencies in their education and training. However, on the whole, they approach their work conscientiously and provide a satisfactory level of service. Our research shows, in fact, that many of them spend countless hours weekly trying to raise their level of competence by pouring over statutes and manuals, acquiring information from lawyers and court officials, or attending any available public legal education courses. A certain measure of courage is required to work, often alone and for a modest income, in a profession where relevant information is sometimes difficult to obtain and where in the present circumstances the threat of prosecution is imminent. Many independent paralegals have managed to carry on business successfully in this environment, underscoring their competence to provide a limited range of adequate legal service even in the absence of formal education and training.

The Task Force considers the overall lack of formal legal education and training for independent paralegals a serious and relevant issue, but not solely determinative of the question of their ability to provide competent legal services. Even without formal education and training, most independent paralegals have been able to offer an array of specialized services to a generally appreciative public. Thus, while mandatory training and education might well enhance the quality of such services, they cannot, in and of themselves, guarantee competence. If the response of the public is any reliable gauge, independent paralegals have been discharging their functions satisfactorily: the number of complaints raised about the quality of their services is not disproportionate with the number of complaints made about practising lawyers. Nonetheless, our research indicates that most independent

paralegals, sensitive to the issue of their education and training, would appreciate having greater access to quality legal education.

e) The Quality of Legal Services Provided by Independent Paralegals

Quality is often difficult to measure or describe. How, then, do we measure or describe the quality of service provided by independent paralegals to the people of Ontario? We cannot judge them in relation to a particular code of excellence or attainment, for we know that independent paralegals operate without regulation. One relevant measure of quality is that of consumer satisfaction with the legal services provided. Consumer satisfaction can be gauged by the examination of two factors: consumer attitudes respecting quality of service, and the number of consumer complaints about specific services rendered.

CONSUMER ATTITUDES

A note of caution here. The Task Force recognizes that the public is not necessarily in a position to know whether or not the legal services provided to them by independent paralegals are adequate or competent. Members of the public may or may not have a realistic sense of the inherent complexity or ambiguity of our laws. In relation to lawyers, independent paralegals, as we have seen, tend to restrict themselves to rather more routine types of service. But they are by no means immune from error, and some members of the public with little or no prior contact with the legal system may not be aware of the existence or gravity of the error. Their judgments of the quality of service rendered by paralegals may or may not be reliable. So also with those consumers who approach an independent paralegal for one particular service only: their views may or may not shed

light on the practices of independent paralegals generally. Finally, without any specific boundaries delineating the permissible scope of practice, independent paralegals will continue to be unsure about what services they are entitled to provide and what standard of competence they are expected to meet. In the circumstances, consumers' attitudes towards independent paralegals cannot be taken to reflect any uniform standard.

Notwithstanding these limitations, the Task Force has made every effort to analyze consumer response to the services of independent paralegals in general. We have had clients of independent paralegals appear before us at the public hearings and in private consultations; we have systematically interviewed clients as part of the empirical study; and we have examined client satisfaction as part of a random telephone survey of approximately 500 households in metropolitan Toronto. On the whole, our research demonstrates that those who have used the services of independent paralegals are satisfied and even very satisfied with the services they received.

On the other hand, our research has also uncovered instances of inadequate, incompetent, and fraudulent independent paralegal practices. We have heard complaints about independent paralegal businesses, begun by individuals lacking business experience, which closed their operations for reasons of financial exigency, leaving their clients in the lurch. But this was not the norm, and we do not believe that such instances are indicative of the overall quality of service provided by independent paralegals. Suffice it to say that even though independent paralegals are not now subject to any formal regulatory mechanism, most of their clients feel that they have received generally satisfactory service. We did not find a public hoodwinked by unscrupulous characters. Rather, we have found that the vast majority of

independent paralegals are hardworking and committed to doing the best job they can. All of which explains why most clients appear to be satisfied with the overall quality of the services rendered.

UNAUTHORIZED PRACTICE AND INDEPENDENT PARALEGALS

The Task Force has examined closely the number of unauthorized practice prosecutions against independent paralegals in Ontario. At the outset, we were asked by some independent paralegals to approach the Law Society for a moratorium on prosecutions during the period of our investigation, but given the Law Society's statutory responsibility and our role as a Task Force we did not feel we were able to comply with this request. We restricted ourselves, instead, to an information-gathering function. Despite our status as an independent Task Force established by the Attorney General of Ontario, it became clear to us that as the prosecutions continued throughout our investigation many independent paralegals were reluctant to come forward with information to assist us in understanding the nature of their operations. The Task Force found that it had to overcome a good deal of fear and reticence from some independent paralegals to come to an understanding of the services they provide.

PROSECUTIONS BY LAW SOCIETY

The Task Force has attempted to identify what percentage of prosecutions arose out of the Law Society's own policing initiatives as opposed to those originating in consumers' complaints of incompetence or sharp practice. The number of prosecutions against independent paralegals issuing from consumer complaints is, of course, one relevant measure, among many, of the public's perception of the quality of those services. The

prosecutions brought by the Law Society on its own perhaps reveal less about the issue of competence than about the issue of regulation or control over independent paralegal activity.

The Law Society takes the position that no one in Ontario may proffer or engage in "legal work", "legal advice", or "legal services" without authorization. By virtue of its prosecutorial authority, the Law Society itself decides what areas or actions are covered by these terms. But it can no longer be said that lawyers alone provide "legal work", "legal advice", or "legal services". For example, some accountants, businessmen and businesswomen, tax consultants, and others provide forms of "legal advice", yet by and large they have not been the subject of scrutiny by the Law Society.

It would be difficult for the average consumer to function without the legal and other assistance provided by professionals such as accountants, tax consultants, and real estate agents. Consumers find useful information wherever they can; they judge the value of that information and use it to order their lives and make important decisions. In other words, consumers may often have occasion to rely on "legal advice" provided by non-lawyers in respect of whom the Law Society shows little interest or concern. On the other hand, many independent paralegals have complained to us about what they consider to be excessive and unwarranted scrutiny by investigators from the Law Society. For now, we simply note the emphasis given to the vigorous prosecution of independent paralegals.

UNAUTHORIZED PRACTICE FILES

Examination of 155 open files of the Law Society dealing with unauthorized practice reveals some clear trends. A great preponderance of complaints were made by lawyers rather than by consumers. Even if we

recognize that an unsatisfied client of an independent paralegal may have subsequently sought the services of a lawyer who then registered a complaint with the Law Society, we have found that in the roughly three-year period (1986 to 1989) during which these complaints were made only 13% of them were initiated by clients of independent paralegals. On the other hand, 87% were initiated from among lawyers, governmental agencies, or the Law Society itself.

With respect to the specific nature of the complaints, 86% proceeded solely on the basis that the independent paralegal was engaged in unauthorized practice. Those few complaints of incompetence or fraud related to one independent paralegal business no longer in operation. While the Law Society certainly has an obligation to monitor all forms of unauthorized legal activity, the preponderance of complaints about independent paralegals has not revealed to us any significant threat to the public. Rather, the great majority of clients of independent paralegals feel that they have received satisfactory legal services. In fact, the information assembled by the Task Force suggests that any intimation of large scale incompetence or fraudulent activity by independent paralegals is incorrect and misleading.

This is not to say that all paralegals have provided high quality legal services to the public. Clearly some of their activities have fallen below an acceptable standard. But, on the whole, independent paralegals even in the absence of formal legal training have proven themselves capable of providing effective service in relation to routine, low-risk legal services such as Small Claims and Highway Traffic Court representations and debt collections. The success of independent paralegals in providing these types of services efficiently and at relatively low cost is, of course, a major reason why

members of the public continue to rely on them. There also appear to be other reasons why consumers seek the services of independent paralegals, and these may have important ramifications for the system as a whole.

WHY CONSUMERS USE INDEPENDENT PARALEGALS

Our investigation clearly shows that over the last few years the public has chosen in increasing numbers to obtain certain legal services from independent paralegals rather than from lawyers. We have spent a good deal of our time trying to find reasons for consumers choosing this method of legal service delivery. The reasons vary with the type of legal service sought, but we have been able to identify some general trends. While many clients may choose an independent paralegal for a routine matter, they are clearly willing to engage a lawyer for a more complex service. Some persons are engaged in legal self-help and only seek basic assistance or guidance through the legal process, while others have to rely more completely on the services of the independent paralegal. The clientele and their motivations are diverse. Some seek the services of independent paralegals because they have had an unsatisfactory experience with a lawyer in the past. Most are appreciative that an option is available to them in the legal services market.

CONSUMER PERCEPTIONS OF LEGAL FEES

Whatever other motivation may underlie a consumer's desire to seek assistance from an independent paralegal, the reason most often cited is that of lower fees. Comparable services obtained from a member of the legal profession are thought to be more expensive. While this perception may not always be accurate, a vast majority of the public perceives independent paralegals' fees to be lower than those of lawyers for comparable services. The Task Force investigated closely the matter of fees because we recognize

that lower fees for legal services almost certainly mean greater access by some consumers to the legal system.

During our public hearings many people reported to us that for one reason or another they had deliberately put off consulting lawyers until absolutely necessary. In some cases, this decision carried momentous implications. Some separated women, for instance, told us that, while they were eager to obtain divorces, they chose instead to remain in failed marriages rather than incur the expense of retaining lawyers. When these same women learned that independent paralegals' services included uncontested divorces, they availed themselves of the service promptly at what they considered to be a reasonable cost.

Are lawyers' fees in fact higher than those of paralegals for the same or similar services sought by the public? The answer would appear to be that on the whole lawyers' fees are higher. In reaching this conclusion, the Task Force emphasizes that fees charged by independent paralegals and lawyers in Ontario are by no means uniform. The Task Force also acknowledges that its information on independent paralegals' fees is more comprehensive and thus likely more accurate than its comparable data on fees charged by lawyers. We found that, unlike independent paralegals, many lawyers were reluctant to publish or otherwise share with us their fee schedules. The independent paralegals, for their part, readily supplied the information, although some seemed to blur or confuse the distinction between fees and disbursements.

One of the more revealing points of reference for the Task Force was a comparison of independent paralegals' fees with those of so-called

"storefront" law offices such as those operated by Jane Harvey and Associates in Toronto. Ms. Harvey believes that many lawyers operate according to fee schedules similar to her own. However, many lawyers clearly charge more for their services than the fees publicized by "storefront" legal offices. While it is obvious that legal fees vary from one lawyer and one firm to another, it is difficult to dispel the perception that many lawyers in Ontario charge according to either what the market will bear or what the client is able to pay.

Although many lawyers believe that their fees are highly competitive with those of independent paralegals, the clear weight of the evidence suggests that for similar types of service lawyers charge more than independent paralegals. However, as compared to independent paralegals, lawyers offer a more complete, knowledgeable, and sophisticated quality of service. Our research confirms this and, given the level of sophistication and the greater measure of detail for comparable services, the lawyers' higher fee schedule can certainly be justified.

On the other hand, we have heard repeatedly from consumers that in respect of many transactions they neither want nor require the degree of sophistication or detail provided by lawyers. Consumers choose the level of service they want or require and the price they are willing to pay for such service. For this reason, the absence of high overhead expenses for most independent paralegal operations is an attractive feature, especially for consumers who assume that lower overhead means lower fees. Many consumers have also told us they choose independent paralegals because they want to have a routine task or problem resolved expeditiously to meet some legal requirement. The services and skills of lawyers, according to many consumers, are more properly reserved for complex legal problems calling for a higher degree of sophistication.

PUBLIC IMAGE OF LAWYERS

The overall image of the legal profession is also a relevant consideration. According to our research, the public's perception of the profession generally is negative, although most consumers indicate satisfaction with services provided to them by their own lawyers. The persistent notion that lawyers are self-interested and motivated chiefly by profit constitutes a sort of generalized response to or impression of the profession as a whole. Unfair or inaccurate as the perception may be, it has gone a long way to stimulating consumer interest in the services offered by Ontario's independent paralegals.

The relaxed, sometimes austere setting of many independent paralegal operations is another factor cited by consumers as a reason for choosing alternate legal services. Many consumers are intimidated by the aura and sometimes the furnishings of law offices, preferring instead the rather more unadorned offices of independent paralegals. Many consumers also believe, rightly or wrongly, that the independent paralegal is less busy than the lawyer and thus freer to focus more immediately on the problem or issue at hand.

Because lawyers are generally thought to be busier than independent paralegals, many consumers also believe that, especially in relation to routine matters, the latter are likely to be more responsive and sympathetic than lawyers who might be inclined to treat such matters as low priority. Consumers seem capable of discerning the simple from the complex. They choose independent paralegals to dispose of the rather more routine legal matters and lawyers for more complicated business. In either case, consumers very much appreciate being able to make a choice.

One example of what the public regards as routine business capable of being performed by independent paralegals is the defence of minor traffic offences. Those who rely on independent paralegals for advice and representation on such matters consider it illogical to expect a lawyer to spend time in traffic court when the costs of the defence may bear no relation to the potential penalty. Small Claims Court matters are a second example, since many litigants believe that the cost of legal counsel in Small Claims Court may trivialize or even exceed the potential recovery available. In some instances, independent paralegals provide service in areas of law either unprofitable to or abandoned by members of the Bar. Independent paralegals have thus accommodated a need and demand for particular legal services. As a result of their advertising and their "no frills" method of service, as well as their willingness to take on minor but high-volume matters eschewed by many lawyers, independent paralegals have been able to fulfil some consumers' legal needs at reasonable costs.

THE POTENTIAL GROWTH AND DEVELOPMENT OF INDEPENDENT PARALEGAL SERVICES IN ONTARIO

The immediate effect of the Ontario Court of Appeal decision in POINTTS was to legitimate certain kinds of agency work by non-lawyers. But an additional implication to be drawn from the case is that independent paralegals should be able to perform services in other areas of law not covered by the Court in POINTTS where the risk to the public is no greater and perhaps even less than the agency work now sanctioned by the Court. For example, some Justices of the Peace and the Provincial Prosecutors Association have expressed the view that independent paralegals have a legitimate role to play in the resolution of minor criminal and quasi-criminal

offences or disputes. The prosecutors have estimated that in recent years as many as 20% of defendants in minor criminal cases in York County have been represented by independent paralegals. While the Justices and the prosecutors would like the independent paralegals to receive better training, especially in advocacy, they have had no difficulty adjusting to the presence of independent paralegals in the minor criminal processes.

The evolution of independent paralegal activity into the realm of minor criminal and quasi-criminal matters raises an issue of fundamental importance to this Task Force. If independent paralegals have performed competently as agents in minor civil and criminal courts, are they not also capable of rendering a similar quality of service in respect of other routine legal matters? It is obvious that independent paralegals already offer a variety of legal services to the public, most of which are routine or of relatively low risk. If independent paralegals are allowed to continue to offer these services, free of prosecution yet subject to appropriate regulatory controls, then a suitable, economically competitive, alternate legal service will be available to consumers in Ontario for very specific types of legal services.

We can, at this point, identify suitable areas of practice for independent paralegals. We have no illusions that it will be a simple task to precisely articulate lines of demarcation for specific services. But the difficulty of the task should not dissuade us from proposing a plan for the delivery of legal services designed to enhance the public's access to law in this province. With the establishment of a rational but minimal regulatory system, Ontario could formally recognize and endorse the right of independent paralegals to provide a limited range of legal services, and thereby provide greater access to the legal system with adequate consumer protection.

GENERAL CONCLUSIONS WITH RESPECT TO THE DEMAND FOR INDEPENDENT PARALEGAL SERVICES IN ONTARIO

Approximately ten years ago, the Professional Organizations Committee for the Province of Ontario had cause to examine, among other issues, the status of legal paraprofessionals[3]. At that time, the Committee concluded that the use of supervised paralegals in law firms had increased, but not to the point that any specific public regulation was required. Following a brief examination of the activities of independent paralegals, the Committee saw no need to make any recommendations to allow them to operate and decided that the legal profession, under the aegis of the Law Society, should retain its jurisdiction over the delivery of all legal services. The Committee set out a number of cogent reasons to reinforce its position. That was ten years ago. But much has changed in the market for legal services in the intervening decade. At the time of the Report of the Professional Organizations Committee, independent paralegal activity in Ontario was minimal. Now, however, independent paralegals constitute a significant part of Ontario's legal services market.

On the whole, the evidence we have gathered over the last year supports the notion that in specific instances independent paralegals are accommodating the legal needs of consumers. As we have attempted to show, there are a number of reasons for this development in Ontario. But independent paralegal activity in Ontario has reached a point now where we believe that, properly regulated, it can assist meaningfully in serving the legal needs of the public. We also believe that a costly or cumbersome

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[3] See Ministry of the Attorney General of Ontario, *The Report of the Professional Organizations Committee*, 1980, 72ff.

regulatory scheme for independent paralegals may diminish the potential benefits of greater access to some legal services at reasonable costs.

Any attempt to predict the economic impact on society of independent paralegal activities requires analysis of and speculation about a whole host of complex factors, not least important of which is the nature of the regulatory scheme under which independent paralegals would operate. Regulation will have important effects upon independent paralegal activity both in terms of quality and cost of services. The economy as a whole will also influence the amount of independent paralegal business generated. The subject of regulation is dealt with in detail in the next chapter. For now, the Task Force wishes only to observe, on the basis of all the data we have gathered, that independent paralegals have been generally successful in providing the consumer with an alternative for the delivery of certain legal services. Provided that a regulatory system can be instituted to provide the public with some protection against unauthorized or abusive practices, independent paralegals should be allowed to continue to provide a particular range of legal services to the citizens of Ontario.

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REGULATION OF INDEPENDENT PARALEGALS IN ONTARIO

INTRODUCTION

The Task Force recommends that independent paralegals should be allowed to continue to operate in Ontario, but that they should also be subject to formal regulation. Given that the services they provide are of limited range and relatively low risk, the regulatory model best suited for the independent paralegals is one imposing only modest constraints upon their practice. The regulatory system and the mechanics of its operation will likely evolve over time, but it need not be so rigorous or complex as that which governs the legal profession in Ontario. It should be the least intrusive necessary, consistent with the public's need for greater access to legal services and for some protection against possible abuses in the delivery of those services.

POSSIBLE ELIMINATION OF INDEPENDENT PARALEGALS/ EXPANSION OF COMMUNITY LEGAL AID CLINICS

Before recommending the regulation of independent paralegals, the Task Force considered and ultimately rejected the possible elimination of independent paralegal activity and the substitution of alternative legal services. One idea advanced before the Task Force was the expansion of

Ontario's community legal aid clinics by the addition of most or all of the services presently performed by independent paralegals. According to this plan the consumer would receive, on a fee-for-service basis, supervised paralegal services in a clinical setting. Paralegals would thus cease to be independent, no longer functioning "out there" on their own. Although the plan has merit, the Task Force decided not to recommend it partly because it is unworkable without major structural changes to the clinical system and without a generous infusion of provincial funds. More importantly, the Task Force considered that if the community legal aid clinics were to be restructured in such fashion to include a fee-for-service component the whole rationale of the legal aid system — assisting those least able to afford legal services — would be compromised.

OPTION OF NO FORMAL REGULATION

The Task Force also considered and ultimately rejected the (sometimes eloquent) pleas of those who believe that independent paralegals should be subject to no formal regulation or control at all. According to this view, market forces alone provide the necessary internal controls upon independent paralegal activity because they eventually allow or even cause only competitive and acceptable services to prevail. The free market exponents also argue that any form of governmental regulation at this time is both costly and unnecessary. They point out that in the present unregulated environment little reliable evidence exists to suggest that independent paralegals are doing harm to the public. They also contend that governmental regulation necessarily means greater cost to the independent paralegal which in turn means greater cost to the consumer (and inevitable costs to the government, as well), thus reducing the independent paralegal's potential to provide a specific and limited range of low cost services.

In rejecting the argument in favour of non-regulation, the Task Force recognizes that there may well be cost implications ultimately passed on to the consumer: regulation may well have the effect of making independent paralegals' services less affordable and less accessible. But the interest in costs of service must be balanced against the interest in quality of service, and we are satisfied that some form of governmental regulation is necessary to protect the public against the possibility of incompetent or fraudulent practices. Although unregulated independent paralegal activity has apparently not produced the levels of abuse feared by many members of the legal profession, regulation guarantees that wherever abuse does occur aggrieved clients will have access to some remedy without having to rely solely on the court system.

The regulation of independent paralegals will improve their overall image and credibility with the public, and provide, at long last, a data base with which these activities may then be continually monitored and improved. Regulation will also mean an end to the present uncertainty over the meaning of "unauthorized practices", an end, in other words, to the continuing conflict between the Law Society and independent paralegals over the proper limits of independent paralegal services.

MINIMALIST APPROACH TO REGULATION

Having decided that some form of regulation of independent paralegals was essential, the Task Force then considered how much regulation or control was necessary to protect the public yet guarantee access to affordable services. Ultimately, we have concluded that the best approach is the least intrusive. Too much regulation might well ensure delivery of a competent service but limit access; no regulation at all would provide no minimum standard of acceptable performance.

In adopting a minimalist approach to regulation, the Task Force specifically recommends against the highly structured self-governance model in place for the legal profession. The less complex nature of the work performed by independent paralegals, their non-professional status and the lower nature of the risk to the public warrant a different mode of regulation. Besides, too much regulation would likely erode whatever potential such services have to increase threshold access to legal services. Regulation of Ontario's independent paralegal activity should not result in the loss of a viable, economically attractive option presently available for consumers of legal services.

The Task Force acknowledges that regulation in any form may well have the effect of reducing the number of independent paralegals practising in Ontario and of limiting thereby consumers' choices in the pursuit of affordable legal services. But again we wish to emphasize that we have tried to balance, and be guided by, two abiding principles: protection of the public against incompetent or fraudulent legal practice and access of the public to convenient, affordable legal service. With these in mind, the Task Force considered several regulatory models as options, and it is to these options that we now turn.

REGULATORY OPTIONS

The regulatory structures of potential value in ordering and rationalizing independent paralegal activity in Ontario include, chiefly, registration, licensure, and certification. We acknowledge gratefully the detailed, comprehensive submissions on this issue from many interested parties. Each option is costly; none is a panacea, guaranteeing the public absolute protection

from abuse or harm. That society is never wholly protected from incompetent or unprofessional service is dramatically demonstrated by the experiences of the legal profession itself. Even with its intricate licensing system, the Law Society of Upper Canada recognizes that it cannot shield consumers absolutely from the incompetence or even the criminality of some few members of the Bar. In 1988, for example, the Law Society received about 3700 complaints concerning the conduct of its members, and 138 complaints were issued by the Society alleging professional misconduct or conduct unbecoming a barrister and solicitor[1]. For the Task Force, then, the challenge was to identify the regulatory system most compatible with the nature of the activities performed by the independent paralegals.

We have emphasized in this Report that the independent paralegals in Ontario tend to concentrate their efforts on lower risk legal services. On the whole, they have provided such services competently even without regulation, and they have done so generally at costs affordable to the public. In these circumstances, then, the Task Force does not believe that an intricate or elaborate licensing system for independent paralegals is warranted. Nevertheless, we believe that at least some form of registration is required and should be enacted into law as one important way of controlling and documenting the present and future activities of Ontario's independent paralegals for the benefit of consumers.

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[1] The Law Society of Upper Canada, *Annual Report*, 1988, p. 10. The nature of the complaints in general was set out in the following terms: "...a lawyer's failure to communicate with his or her clients is the most common complaint. Other concerns included: failure to fulfill financial obligations; delay; negligence; failure to report to the client; fees; failure to comply with undertakings; not following client instructions; conduct unbecoming a solicitor; and conflict of interest.

The Society received an equal number of complaints in the areas of real estate and civil litigation. Together, they accounted for 66% of all complaints. Matters relating to matrimonial law and wills-estates accounted for another 25%. The remainder were distributed among the areas of criminal, administrative, and corporate-commercial law."

REGISTRATION SYSTEM PROPOSED

Earlier in this Report, we observed how and why it was that our study of independent paralegal activities in Ontario was hampered by a paucity of concrete, verifiable data. Even now, after more than a year of research, our knowledge of the independent paralegal business in Ontario although considerable is still not complete. A primary goal of any regulatory system should be to gather and make available accurate and up-to-date information about how legal services have been and are being provided to the public by independent paralegals. Such information is essential to improve the regulatory process adopted, and to respond to the changing needs of independent paralegals and consumers. It will also serve to eliminate the "black market" nature of independent paralegal services.

REQUIREMENT OF REGISTRATION

Therefore, the Task Force recommends that all independent paralegals be required to register with the governing authority as a pre-condition to practise. Individuals should be allowed to engage in independent paralegal activity on the following conditions:

- that they are of good character;
- that they register with the Registrar of Independent Paralegals;
- that they pay a fee or fees related to the area or areas of practice they wish to pursue; and
- that they abide by the rules of practice established by the Registrar.

The Office of the Registrar of Independent Paralegals and the duties and responsibilities of that Office are elaborated later in this chapter. The Task Force proposes that, following registration, an independent paralegal should be allowed to carry out specifically defined functions (see Chapter 5) and should be immune from prosecution for unauthorized practice under section 50 of the *Law Society Act*. Later in this Report, in Chapter 6, we suggest procedures for the discipline of independent paralegals and for the protection of consumers that should be included in the regulatory scheme.

The system thus proposed by the Task Force is, in effect, a registration system. Without registration, no individual shall be allowed to perform independent paralegal services. Nevertheless, registration should be fairly accessible and subject only to the educational requirements or their equivalent as set out in Chapter 4 of this Report. The Task Force believes that with well-conceived rules of practice, specific lines of task delineation, and a responsive and knowledgeable registrar, the registration model we propose is workable.

STRUCTURING AND ADMINISTERING THE REGISTRATION SYSTEM

Having concluded that a simple registry system was best suited to regulate the Ontario independent paralegal industry, the Task Force then considered what Office or authority would be responsible for structuring and administering the system. On this important subject, we examined many options and received considerable advice. Some have suggested that the regulatory system should be administered by the Law Society of Upper Canada. Others, opposed to the Law Society's involvement, contend that the operation of the regulatory system should be a responsibility of one of the

government Ministries, such as the Ministry of the Attorney General or the Ministry of Consumer and Commercial Relations. Still others argue that independent paralegals, like lawyers, ought to be allowed the right to self-governance. We have weighed carefully the benefits and limitations of each of these recommendations and concluded that on balance, the Ministry of Consumer and Commercial Relations is best suited to oversee the regulation of independent paralegals in Ontario. Our reasons for arriving at this recommendation follow.

a) The Law Society Option

Many individuals and groups, especially from the legal profession, urged that the regulation of independent paralegals should occur under the aegis of the Law Society of Upper Canada. In fact, this was one of the essential features of former Bill 42 which, of course, was not enacted. According to this argument, it would be unwise to divide the market for legal services among different regulatory bodies and so create the possibility for inconsistent and conflicting policies. An experienced regulator of the legal services market for many years, the Law Society seemed to many the logical place to locate institutional control over independent paralegals.

However, the Law Society in its brief to the Task Force has indicated that it does not wish to assume a regulatory role in relation to independent paralegals. Moreover, the Law Society would be placed in the potentially difficult position of having to make decisions on issues where the interests of independent paralegals and those of the legal profession are in conflict. Nevertheless, the Law Society should be represented in an advisory body to work with and assist the Registrar of Independent Paralegals in formulating

and implementing policies and regulations governing independent paralegals in Ontario. In this capacity, the Law Society will be particularly useful in reducing or eliminating potential conflicts in policies respecting lawyers and independent paralegals. Beyond this advisory role, however, the Law Society should exercise no authority over independent paralegals in Ontario.

b) The Self-Governance Option

Another administrative structure of interest to the Task Force was that of self-governance, but the Task Force believes that the independent paralegal service sector is not appropriate for this regulatory model. Self-governance by independent paralegals is not a viable option chiefly because of their non-professional status and the very recent development of their activities. Ontario's independent paralegals have already formed some voluntary associations and some independent paralegals have created groups informally, but none of these organizations is in a position to provide administrative control province-wide. Nor is it likely that any group or association will be able to do so in the near future. Still, the Task Force encourages the province's independent paralegals to continue to develop their voluntary associations. This process of organization is critical to the maintenance of public confidence in the activities of independent paralegals. Without it, the minimalist approach to regulation proposed by this Task Force might well be subjected in the future to demands for some increased level of regulation.

c) The Ministry of the Attorney General Option

The Ministry perhaps most familiar with the particular nature of independent paralegal services is that of the Attorney General. It was the Attorney General himself, after all, who called for the creation of this Task

Force on the assumption that the government needed to know more about the scope of independent paralegal activities in this province. But the Ministry of the Attorney General, interested as it is in the formulation of a policy in respect of Ontario's independent paralegals, is not preeminently a regulatory body and has had little experience in structuring or administering regulatory agencies. In our view, therefore, the Ministry of the Attorney General is not ideally suited to oversee the administration of the system regulating independent paralegals.

PERCEPTIONS OF INDEPENDENCE

The argument could also be made that the administration of independent paralegals under direct authority of the Ministry of the Attorney General might well create the perception of excessive governmental influence or control over the activities of this group. The Attorney General, as the chief law officer of the Crown, has a duty to uphold or defend legitimate governmental and societal interests. It may be considered inappropriate for him to act in the government's interest and, at the same time, to exercise regulatory authority over individuals who may seek to challenge the position of the government in a court or elsewhere.

d) The Ministry of Consumer and Commercial Relations Option

In suggesting that the Ministry of the Attorney General should not be responsible for the regulation of independent paralegals, we are not advocating that they should be free of any kind of governmental control. Minimal governmental control over independent paralegals through another agency of government represents no significant threat to the carrying out of their activities. With the establishment of guidelines and a specific regulatory agency, that degree of independence necessary for paralegals to carry out their activities can be assured.

As we have suggested, the administration of independent paralegals should be the responsibility of a provincial Ministry other than the Attorney General. The best choice seems to us to be the Ministry of Consumer and Commercial Relations which has as its chief mandate consumer protection with respect to the service industry and small businesses. On the whole, we believe that the regulation of independent paralegals would be most effectively realized in this same general context. The registration model we have proposed has many features similar to those currently operated under the Ministry of Consumer and Commercial Relations.

CONSOLIDATION OF CONSUMER PROTECTION PRACTICES

The Ministry has also shown interest recently in consolidating within a single statute consumer protection practices in a variety of industries, trades, and businesses[2]. Because of this important Ministry initiative, the Task Force believes that the regulation of independent paralegal services should be brought within the ambit of the Ministry of Consumer and Commercial Relations to effect appropriate regulations in favour of consumer protection. We recommend that our regulatory proposals be accommodated within this general format with appropriate modifications. Legal services performed by independent paralegals are in many ways different from other commercial services, but they need not be regulated differently from the general principles informing consumer protection in the wider business community. In any case, should the consolidation of Ontario's consumer protection laws become a reality, the Ministry understands that any regulations unique to a particular industry, trade or business will likely have to be specified outside the

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[2] See Ontario Ministry of Consumer and Commercial Relations, *Legislative Review Project*, 1988.

framework of the foundation statute. Our proposed regulatory model for the independent paralegal profession accords well with this approach.

e) The Office of the Registrar of Independent Paralegals and the Advisory Panel

The regulatory process recommended should be headed by an individual holding the position of Registrar of Independent Paralegals with ultimate responsibility for the registration and control of the system. The Registrar would be required to maintain an up-to-date register of all independent paralegals in the province and oversee the disciplinary process which would be enacted as part of a statutory scheme. One of the Registrar's most important functions should be to implement regulatory guidelines setting out permissible areas of practice for independent paralegals.

ADVISORY PANEL

In monitoring the system and in formulating policy guidelines the Registrar should have the assistance of an Advisory Panel composed of a representative of the legal profession (an appointee from the Law Society), a member of the voluntary association of independent paralegals, a member of the public, a representative from the Attorney General's office and a legal academic. The Registrar should be a progressive member of the legal profession with several years of general practice or related experience.

The Registrar should operate within the regulatory framework of the Ministry of Consumer and Commercial Relations. As much policy as possible should be enshrined in an enabling statute and regulations so that the Registrar is relatively free from political nuances in fulfilling the sensitive duties and responsibilities of the Office. However, the budget of the

Registrar's Office should receive approval through the Ministry of Consumer and Commercial Relations, and all regulations authorized by the enabling statute should be approved by the Lieutenant Governor-in-Council. The Registrar should also be required to submit an annual report to Cabinet, and that report should be tabled in the Legislature.

In short, the Task Force recommends the creation of a minimal regulatory structure at once efficient and responsive. Within the Ministry of Consumer and Commercial Relations, the Registrar should be provided with whatever authority is necessary to carry out the responsibilities of the Office directly and effectively. Far from representing any particular constituency, the Registrar must be understood to represent the public interest. In such a framework, unencumbered by a large bureaucracy, and under the aegis of a Registrar with the authority to set and enforce regulatory controls, consumers of legal services in this province should have ready access to the services of independent paralegals and yet be reasonably certain that their interests will be sufficiently protected.

4

THE EDUCATION AND TRAINING OF INDEPENDENT PARALEGALS

INTRODUCTION

Independent paralegals in Ontario do not presently require any formal training or education as a prerequisite to practice. Not surprisingly, we have found, as we indicated earlier in Chapter 2, that most independent paralegals practising today did not study law as an academic discipline before entering the profession. Their formal training is deficient not only because structured programs of study do not exist for them but also because informal, in-service sources of information have not been made readily accessible to them.

It is clear to us that independent paralegals would serve the public better if they were to be given greater access to legal information. The question is whether or not such deficiencies in education and training are best addressed within or apart from a formal regulatory process. In other words, should an educational and training program of independent paralegals take a specific form and, if so, should the program be mandatory?

SHOULD EDUCATION AND TRAINING BE MANDATORY?

The Task Force studied various educational and training options for independent paralegals and considered how an ideal educational and training program for them might be designed. We have consulted a number of educators, particularly those in the Community Colleges, and we are confident that a curriculum can be made available if planned by legal education specialists. Accordingly, we recommend that an educational and training program or its equivalent should be required as a precondition for registration as an independent paralegal in Ontario.

AVAILABILITY OF EDUCATIONAL PROGRAMS

Most observers believe that the education and training of independent paralegals should be the cornerstone of any proposed regulatory scheme. Many have cited particular instances of what they considered to be inadequate service by independent paralegals and have suggested that these inadequacies — poor advocacy, for instance — could be remedied with sufficient instruction. We certainly agree that independent paralegals acting as agents before lower courts and administrative tribunals would benefit from professional advocacy training. They would benefit, too, from the development of small business skills. With appropriate schooling, independent paralegals are likely to provide a better quality of service in most or all of their areas of practice. The availability of education and training for independent paralegals is thus, in our view, a high priority. Given the limited range of activities we recommend for independent paralegals, their formal legal education need not approach either the length of time or the level of sophistication required of students of law. Nevertheless, a two-year program under the auspices of the Community Colleges, or the equivalent of such training in relevant work experience or practice, seems appropriate.

COST OF EDUCATIONAL PROGRAMS

We acknowledge that the expense to students of a mandatory two-year program may decrease the number of those who aspire to be independent paralegals and perhaps ultimately escalate the costs of the legal services they provide. However, a mandatory educational and training program for independent paralegals will provide some assurance to the public that those registering and offering services as independent paralegals will have acquired at least some modest, acceptable standard of competence as a prerequisite to practice.

STRUCTURE OF CURRICULUM

The two-year Community College program should be structured in a manner similar to that currently in place for law clerks in such institutions as Durham College. The curriculum for law clerks will have to be modified, of course, to include the specific subject matter and procedures pertinent to independent paralegal activities. We recommend that those responsible for the law clerks' curriculum meet with the Registrar of Independent Paralegals and the Registrar's Advisory Panel to construct the independent paralegals' curriculum. The consultants on curriculum design may wish to consider a structure providing for one year of general legal studies followed by a second year of instruction in specific areas of practice. In any event, the program of study thus developed for independent paralegals will undoubtedly relate directly to the specific areas of practice and the two registration streams identified in Chapter 5.

The establishment of a formal educational and training requirement will naturally have important implications for at least some of the approximately 750 independent paralegals currently practising in Ontario. Before deciding whether current practitioners meet the minimum qualifying standards to continue their practices, the Registrar of Independent Paralegals should

carefully assess on a case by case basis their relevant field-related experiences. In many cases, we predict that the Registrar will have little hesitation in concluding that current practitioners satisfy a minimum qualifying standard related to their specific area or areas of practice. The POINTTS organization, for example, requires that its members have at least ten years' experience as police officers and some workable knowledge of traffic court procedures. In our view, the fulfilment of these criteria constitutes the related experience necessary to register for agency representations in respect of minor traffic and quasi-criminal matters.

GRANDPARENTING CURRENT PRACTITIONERS

We recommend, therefore, the establishment of a "grandparenting" mechanism according to which any independent paralegal currently practising in Ontario may apply to the Registrar of Independent Paralegals for the right to practice in a specific area or group of areas without having to enrol in the two-year mandatory program. Independent paralegals seeking exemption from the educational and training program must satisfy the Registrar that they possess the minimum skill and experience necessary to carry on business in specifically defined areas. The Registrar, assisted by the Advisory Council, should feel free to develop appropriate qualifying criteria, although we would suggest that two years' practical experience in any permissible area of independent paralegal practice might normally constitute a fair minimum standard. Consideration might also be given to the creation of a qualifying or challenge examination in cases where the Registrar is in doubt about whether or not an individual has satisfied the qualifying criteria or in cases where an independent paralegal challenges the Registrar's decision.

NEW ENTRANTS

Those who are not currently practising as independent paralegals but who seek to enter the profession before the establishment of the mandatory

Community College program must also satisfy the Registrar of their qualifying criteria according to the same standards required of current practitioners. For example, some paralegals presently working in supervised settings may wish at some point to become independent paralegals. Many but not all supervised paralegals have completed the two-year law clerks' program. The Registrar of Independent Paralegals will have to develop criteria for assessing the qualifications of supervised paralegals to carry on business in specific areas of practice permitted to independent paralegals. We would suggest, however, that supervised paralegals should be eligible to register for particular areas of practice relevant to their prior work experiences, provided they possess a law clerk's certificate or diploma and one year of related practical experience in a law office or clinic, or, alternatively, two years of related practical experience in a law office or clinic.

Still others who wish to enter a particular area of independent paralegal activity on the basis of their knowledge of or experience in that area will likewise have to satisfy the Registrar of their qualifications. For example, an experienced, former immigration officer may apply to the Registrar for permission to offer independent paralegal services as an immigration consultant, or a duly accredited chartered accountant may seek to register as an independent paralegal in the area of simple incorporations. The Registrar will have to assess the credentials of such individuals on a case by case basis and determine in what specific area or areas, if any, they will be allowed to carry on business as independent paralegals. In this context, too, a qualifying examination may be useful in the assessment process. Thus, for the purpose of determining eligibility to practise apart from the two-year mandatory educational and training program, we recommend that the Registrar be

granted a wide discretion to determine educational and work-related equivalencies to the mandatory program.

We have concluded that mandatory education and training or their equivalents for independent paralegals are required in the interest of consumer protection. The result may be a marginal increase in the cost of the delivery of legal services in Ontario, but also a more uniform standard of service. And although initially there may be some difficulty in identifying and evaluating threshold educational qualifications and their equivalents for independent paralegals, we do not believe that such criteria, at least as we envision them, are inconsistent with a minimalist regulatory model. The system we propose obviously does not place the government in the position of guarantor of competence in the industry, but it puts in place a registry system capable of providing a good measure of protection for the public. As knowledge and experience of independent paralegal activity in Ontario grow, the Registrar can implement modifications or adjustments as required.

ENHANCING NON-MANDATORY EDUCATIONAL AND TRAINING OPPORTUNITIES

We wish to emphasize that while we recommend a mandatory educational and training component for independent paralegals, their ongoing education and training beyond this minimum standard is of vital importance to the life and growth of paralegals. Even after the creation of the two-year mandatory program, continuing educational and training opportunities for independent paralegals should be developed or enhanced especially through the development of specialized courses and programs. We believe that the demand for such services is high and that courses and programs can be mounted.

Encouragement of a strong voluntary association among the independent paralegals will also promote the dissemination and exchange of information and the recognition of recurring problems. Ultimately, it may be that appropriate revisions to the mandatory educational and training programs will be effected through the cooperation of an independent paralegal association. In any event, independent paralegals will need access to skills development and continuing education to remain an effective alternative for consumers of legal services. We trust that many of these improvements will be generated by the voluntary association of independent paralegals.

5

THE AREAS OF PERMISSIBLE PRACTICE

INTRODUCTION

No other issue relating to paralegal activity has proven so contentious, so divisive, as that involving the identification of areas of practice acceptable or appropriate for independent paralegals. Indeed, committees of the Canadian Bar Association (Ontario) and the Law Society of Upper Canada have devoted a good deal of time and effort to this issue. We are obviously indebted to both groups for their work, and trust that what we have proposed here will receive broad and early acceptance since it builds on their discussions.

It has been argued that, because virtually any kind of legal service possesses a perhaps limitless potential for complexity, persons lacking a lawyer's background and errors and omissions insurance ought not to be allowed to practise at all. Even those individuals — the vast majority, in our experience — who concede that independent paralegals can indeed function usefully in certain specific realms disagree as to what those areas ought to be. In the face of all this diversity of opinion, and of what we would consider to be the inconclusive discussions within the legal profession, the Task Force

has concluded that no matter what areas of practice it finally recommends for independent paralegals, the differences of opinion expressed over this most sensitive of issues may be with us for some time. Nonetheless, in making our proposals we are confident that as the system of regulation begins to take hold a greater and greater consensus will emerge on the areas of practice appropriate for independent paralegals.

PERMISSIVE AND RESTRICTIVE APPROACHES TO REGULATION

The position taken by the Task Force on this issue has been to try to remain consistent with the basic principles of access, affordability, and consumer protection with respect to legal services. In general, this means that independent paralegals should be restrained from providing some but not all legal services. Some parties have suggested that the Task Force adopt what is called a "permissive approach" to the regulation of the areas of independent paralegal practice. According to this approach, the regulations would specify all prohibited areas of practice: any activity not expressly prohibited would then be open and available to the independent paralegal. But we think the better approach is to stipulate by regulation the permitted rather than the prohibited areas of practice.

The task of identifying areas of permissible practice is not an easy one because, as everyone knows, there is no existing lexicon of "law services" or "lawyers' tasks", and, even if there were, that lexicon would always have to be conceived as being in a state of flux. Legal services are by their very nature protean and malleable; they are not impervious to change. Still, we think it critical to the success of a regulatory system that we identify those areas within which independent paralegals will be permitted to provide their services. The Registrar of Independent Paralegals, assisted by the Advisory Panel, can issue adequately detailed guidelines or rules to independent

paralegals to cover those situations in which the legitimacy of a particular legal task as performed by an independent paralegal may be unclear. In this way, the scope of independent paralegal activity in Ontario can and will attain an acceptable degree of certainty.

THE CRITERIA USED TO IDENTIFY AREAS OF PERMISSIBLE PRACTICE

The criteria used in identifying permissible areas of independent paralegal practice include the following:

1. The relative level of risk or the possible negative consequences to the consumer associated with the legal service;

2. the relative difficulty of the specific tasks required to competently provide the specific legal service;

3. the general level of education and training of most independent paralegals;

4. the need to have a responsive and flexible system capable of future adjustment;

5. the need to recognize the current legal services offered by independent paralegals and the level of expertise exhibited with respect to such services; and

6. the extent to which there is an existing consumer need for a particular type of legal service.

These criteria underscore the view of the Task Force that independent

paralegal activity should be fairly narrowly circumscribed, at least in the early stage of the regulatory era.

SCOPE OF LEGAL SERVICES

Although the criteria used by the Task Force were helpful in identifying general areas of practice open to independent paralegals, they could not assist us in drawing important distinctions between and among activities within particular areas of practice. Some areas, such as the application for a criminal pardon, would appear to involve a relatively uncomplicated type of legal service. However, in other areas, such as wills, it will be necessary to impose restraints on the legal service provided by independent paralegals. The demarcation of permissible practices within an area such as wills may prove to be difficult, but not impossible. The Task Force believes that the Registrar, on the advice of the Advisory Panel, will be able to draft and interpret specific restrictions relating to particular areas of practice. Much of the Registrar's time is likely to be devoted initially to this purpose.

OBLIGATION TO REFER PROSCRIBED PRACTICES TO LAWYERS

Adjustments will surely be made as the regulatory system unfolds and the legal system evolves. Our recommendations are intended to provide from the outset that some important measure of stability and certitude will be brought to bear on independent paralegal activity. Certain legal services must be seen unequivocally as within the exclusive domain of lawyers. Regarding these matters, independent paralegals will be required to refer all enquiries to members of the legal profession: independent paralegals have a positive obligation not to assume responsibility for those legal matters not expressly identified by regulation and to refer matters beyond their competence and experience.

REGISTRATION STREAMS

Some parties have suggested that an effective way of regulating independent paralegals is to require them to register for each area of practice in which they intend to provide legal services. However, the Task Force has concluded that such a system is unwieldy and unnecessary, especially given the approach to regulation adopted in this Report. We believe that two registration streams are sufficient to guarantee control over the system.

TWO REGISTRATION STREAMS

One registration stream would comprise independent paralegals who act as agents before Courts such as Small Claims or administrative tribunals such as the Workers' Compensation Board. The other stream would include independent paralegals functioning as legal assistants in non-agency matters. These would include, for example, various types of office work such as the preparation and filing of documents, applications for changes of name, and uncontested divorce petitions. The Task Force recommends that independent paralegals register in one of the streams, identifying the area or areas (outlined later in this chapter) in that stream to which their activity will be limited. In a limited number of cases a paralegal may, after satisfying the necessary requirements, register in both streams, provided the requisite fees are submitted and the registrants are otherwise qualified. The establishment of two areas of registration will make it easier to develop consistent policies and to monitor such matters as discipline and the compensation funds.

These two areas of registration should not be thought of as wholly discrete or mutually exclusive categories, for there is bound to be some overlap between agency representation and office work. Regardless of the overlap, independent paralegals should be permitted to carry out any legal services permissible within the stream or streams for which they have

registered. This twofold division should assist the public in identifying the independent paralegals who provide the services they require and facilitate the regulation of independent paralegal activity.

REGISTRATION OF INDEPENDENT PARALEGALS AS AGENTS

With respect to the first stream of registration, we believe that all independent paralegals who function as agents should be registered under one category. This category would embrace the areas specifically cited by the Court of Appeal for Ontario in the POINTTS decision, as well any other areas where representation by agents is allowed by statute, including representation for provincial offences, such as *Highway Traffic Act* matters, summary conviction offences under the *Criminal Code,* and appearances before the Small Claims Court as well as various administrative tribunals. Provided that independent paralegals register pursuant to the regulatory system, they should continue to be able to offer services in areas where agency representation is allowed by statute.

AREAS OF PRACTICE FOR INDEPENDENT PARALEGALS AS AGENTS

a) Criminal and Quasi-Criminal Matters

In the criminal and quasi-criminal areas, agency representation in respect of proceedings under the *Provincial Offences Act* and summary conviction offences under the *Criminal Code* has already been validated by the Court of Appeal for Ontario. There is relatively little controversy over independent paralegal activity in these areas, partly because individuals charged with minor offences under these statutes often do not retain lawyers

to assist them. In these circumstances, consumers may feel that the cost of a lawyer is prohibitive, and, in any event, many lawyers will decline to accept a retainer if the expense involved in time and effort is not justified by the nature of the offence charged. Nevertheless, many individuals need and want assistance in dealing with these minor offences, especially summary conviction and traffic offences where insurance rates may be negatively affected. Independent paralegals have offered an economical alternative in these areas, and should be permitted to continue to do so.

CRIMINAL CODE
HYBRID OFFENCES

Problems have arisen for independent paralegals and their clients in certain proceedings under the *Criminal Code* including, for example, bail hearings and "hybrid" offences usually dealt with in a summary fashion. While independent paralegals may represent clients charged with hybrid offences following a Crown election to proceed by summary conviction, they cannot do so prior to the election because of the possibility, however unlikely, that the Crown may decide to prosecute the case by way of indictment. The uncertainty arising for independent paralegals and their clients by virtue of these hybrid offences is regrettable, but while we sympathize with the position of the agents in this regard, and hope for some accommodation for them through amendments to the criminal law, this is not an issue within provincial jurisdiction.

b) Small Claims Court Matters

Independent paralegals are currently allowed to operate as agents in the Small Claims Court and frequently do so, especially in relation to issues of debt collection and credit counselling. We recommend that these activities be maintained in the regulatory system. Some have argued that independent

CREDIT COUNSELLING

paralegals ought to be prevented from assisting consumers with credit counselling because free credit counselling services are available in most Ontario municipalities. We simply note that consumers should continue to have choice in this field. Credit counsellors and independent paralegals may provide different approaches to credit counselling and debt consolidation.

SMALL CLAIMS COURT REFORM

We note two other issues of importance associated with representation by independent paralegals in the Small Claims Court. First, the province of Ontario is currently in the process of court reform, and it is likely that the Small Claims Court will receive an expanded monetary jurisdiction to $5000.00 perhaps even higher[1]. These developments do not cause us to alter our recommendation; whatever this Court's monetary jurisdiction, it will retain its summary nature and remain the most accessible forum for matters relatively minor in nature. Second, we also recommend that costs be made available to successful litigants represented by independent paralegals. It is the case now that costs are awarded in Small Claims Court only if the successful party is represented by a solicitor or a student-at-law. We believe this distinction is discriminatory, and harms clients as well as independent paralegals. The awarding of costs upon request is a matter of judicial discretion in any case, and provides a check against possible abuse.

COSTS

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[1]See T.G. Zuber, *Report of the Ontario Courts Inquiry*, Ontario Ministry of the Attorney General, 1987; see also *An Act to Amend the Courts of Justice Act*, 1984, S.O. 1989, c.55, ss.21-32.

c) Matters Before Ontario's Administrative Agencies and Tribunals

MAINTAINING EXISTING PRACTICE

The Task Force believes that if the existing practice of an Ontario administrative agency or tribunal is to allow agents to appear before it, then independent paralegals registered as agents should be deemed to qualify for the purpose. We note that subsection 10(a) of the Ontario *Statutory Powers Procedure Act* specifically allows for agents to appear before many administrative tribunals and agencies in Ontario, including the Workers' Compensation Board, the Ontario Labour Relations Board, the Welfare Appeal Board, and so on. Subsection 23(3) of the Act also allows a tribunal discretion to exclude incompetent agents. Some tribunals, for example, the Workers' Compensation Appeals Tribunal, have developed written criteria to assist them in exercising this statutory authority[2].

STATUS OF UNION OFFICIALS

To avoid any uncertainty on the subject, we would emphasize here that the issue of representation before administrative bodies applies in our frame of reference only to independent paralegals functioning as agents. For greater clarity, a union official appearing on behalf of a fellow employee before an administrative tribunal is not to be construed as an independent paralegal and certainly does not have to register as an agent under the regulatory scheme we propose. Union officials fall outside our definition of an independent paralegal.

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[2] Workers' Compensation Appeals Tribunal, Decision No. 600/89, Addendum, June 11, 1989.

d) Matters Before Federal Administrative Agencies and Tribunals

With regard to federal administrative agencies, we recognize that individual agencies will continue to control their own internal processes. Constitutionally, federal administrative tribunals are likely free to establish whatever policies and procedures they wish with respect to matters such as representations by agents. Therefore, the activities of independent paralegals in these areas of federal jurisdiction will necessarily remain free from provincial regulation. Despite this limitation, the Task Force has received many submissions relating to agencies or tribunals operating under federal law, most notably those dealing with matters of immigration law. This is not surprising since it has been estimated that in the Toronto area alone as many as 100 independent paralegals provide services pertaining to immigration law matters. Because of all the interest and activity, we consider it necessary to comment briefly on this specific aspect of federal law.

e) Immigration Law Matters

After careful consideration, we have determined that independent paralegals should be allowed to continue to offer immigration services. We note that federal immigration law permits representation by agents at Inquiry hearings and at the various hearings presided over by the Immigration and Refugee Board. But many other legal services associated with immigration law do not involve agency representation. Independent paralegals frequently provide consultation and advice on such matters as applications for permanent residence and sponsorship undertakings. We think that independent paralegals should be allowed to continue to offer these types of consultative services. Any effort now to restrict their activities in immigration law to matters of agency would be confusing for the public.

Independent paralegals have functioned as immigration consultants for many years. Although allegations of abuse and incompetence have occasionally been raised against some of them, it is clear that many have developed considerable expertise in the area. The federal immigration statute provides limited authority for the regulation of immigration consultants, although to this date no regulatory scheme has been enacted for this purpose[3]. We believe that many consumers of legal services, especially within particular religious and ethnic communities and language groups, would be disadvantaged if independent paralegals were no longer allowed to provide services in relation to immigration law matters.

In drawing this conclusion, we recognize the seminal importance of many immigration law matters, particularly those relating to refugee status. We note, too, that there appears to be an increasing number of lawyers willing to practise immigration law and indeed the possible availability of legal aid for these matters may make this the preferred option. Individuals seeking assistance in immigration law matters would thus appear to have considerable choice as to the type of legal assistance they receive. Under the registration system we propose, consumers who choose to be represented by independent paralegals will have the protection afforded by the system. In any event, in the absence of federal regulation independent paralegals should be permitted to offer immigration law services under the proposed regulatory scheme.

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[3] See Office of the Minister of Employment and Immigration, *The Exploitation of Potential Immigrants by Unscrupulous Consultants*, April 1981; see also, *Immigration Act*, R.S.C. 1985, c. 1-2, s. 114 (1) (v).

f) Landlord and Tenant Matters

RESIDENTIAL TENANCIES

The Task Force recommends that independent paralegals also be allowed to continue to provide services in landlord and tenant matters relating to residential tenancies, and that such services be included in the agency stream of the regulation process. Some independent paralegals have developed substantial expertise in this field serving both landlords and tenants. Relatively few lawyers concentrate their efforts in landlord and tenant law with the result that consumers continue to experience a need for further legal services of this kind. In addition, current landlord and tenant legislation in Ontario allows agents to appear in District Courts in matters involving the termination of a tenancy. Again, we see no reason to end the current practice allowing independent paralegals to provide legal services in respect of residential tenancies, especially when we consider that under our proposed regulatory regime consumers will have additional protection in relation to those services.

REGISTRATION OF INDEPENDENT PARALEGALS AS LEGAL ASSISTANTS

The Task Force recommends that a second stream of registration be provided for those independent paralegals engaged in matters other than agency. In this role, the paralegal's services would be mostly confined to office work, with the paralegal functioning as a kind of legal technician or assistant. Certain independent paralegal activities in these areas have been sharply criticized, especially by lawyers. This is surprising insofar as the activities undertaken by independent paralegals functioning as agents before courts and tribunals may have more far-reaching consequences than many of the other services provided by independent paralegals in the role of legal technicians or assistants.

It is true that the actions of independent paralegals working as agents are routinely overseen by judges, Justices of the Peace, or other judicial and administrative officials. Yet it would be inaccurate to suggest that independent paralegals functioning as legal technicians or assistants are beyond any kind of order or control from within the legal system. Administrative or judicial officers also oversee the products of independent paralegals' office work, including, for example, the documents prepared and filed in connection with petitions for divorce and simple incorporations. These are matters which must be carried out according to standards of form and procedure well known in the profession. This being the case, it does not seem logical to us to conclude that independent paralegals may function as agents before various courts and tribunals, sometimes on matters of considerable importance, yet be prohibited from performing relatively lower risk office tasks such as the completion of standard-form documents.

At the heart of the controversy surrounding many of the legal technical functions performed by independent paralegals is the question of whether or not independent paralegals have sufficient understanding of the law to provide informed advice in respect of these legal technical services. Some lawyers have argued, for example, that there is no such thing as a "simple will" or a "simple incorporation" and that decisions respecting what to include in wills or articles of incorporation may involve far more than the selection of standard-form or boilerplate clauses. It all depends on the client's needs and the best advice relevant to those needs. The Task Force certainly agrees that enlightened decisions respecting the merits of a particular form of business association or the language to be incorporated in a particular will or divorce petition may involve more than the mechanical filling out of

forms. There may indeed be some risk in allowing independent paralegals who possess little formal legal education to provide limited services in these areas. It should be stressed, however, that independent paralegals have been providing these services for some time now, and the evidence before this Task Force suggests that their work in these areas has been generally accepted by their clients. The Task Force recommends that independent paralegals be allowed to continue to function as legal assistants or technicians.

Ultimately, it must be for consumers to decide whether they want a "no frills" service, which independent paralegals can surely provide, or a more comprehensive analysis within the realm of a lawyer's expertise. The consumer of legal services is always exposed to some risk. Government cannot and does not seek to protect everyone from every conceivable harm. But if, by regulation, restrictions are placed on the types of legal services provided by independent paralegals, and if under the regulatory scheme independent paralegals are obliged to refer more complex matters to lawyers, they can continue to offer an affordable, flexible alternative for the consumer of legal services. Again, the registry system will allow for ongoing review and evaluation of the delivery of such services, and help to eliminate any abuses. But we consider it important to address consumers' needs by increasing consumers' choices.

AREAS OF PRACTICE FOR INDEPENDENT PARALEGALS AS LEGAL ASSISTANTS

a) Changes of Name, Criminal Pardons, and Powers of Attorney

Some areas of legal office work are relatively straightforward, requiring only attention to detail and compliance with some administrative regulation through the completion of forms or the emulation of a well-established precedent. Applications for a change of name or a criminal pardon are of this type. The drafting of the documents necessary to effect a power of attorney is also relatively routine. We see no reason to restrict or proscribe activities of this type when carried out by independent paralegals. Consumers, of course, can always consult lawyers for these services with all the protection that such a choice offers. However, they should also have the opportunity to go to an independent paralegal for these services where they would have the benefit of the protection afforded under our proposed regulatory system.

b) Wills

The Task Force recommends that independent paralegals be allowed to offer legal services directly to the public in the preparation of wills. For some time now, independent paralegals have provided this useful service, assisting many people who might not otherwise have written a will at all. In any event, Ontario's succession laws prescribe basic rules for the distribution of estates. If a person dies intestate, the distribution is effected wholly by statute. Even where there is a will, particular statutory provisions, such as those set out in section 58 of the *Succession Law Reform Act*[4] on minimum distribution to dependents, will override contrary provisions in the will.

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[4] The *Succession Law Reform Act*, R.S.O. 1980, c. 488, s.58; see also, for example, the *Family Law Act*, S.O. 1986, c.4, s.5 (3).

HOLOGRAPH WILLS

In support of our recommendation that independent paralegals be allowed to offer service in the preparation of wills, we would emphasize that the handwritten or holograph will has legal standing in Ontario, and in fact legal education material is readily available to those who wish to draw wills in their own hand. Given the validity of the holograph, it seems to us illogical to deny independent paralegals the authority to assist people in the preparation of a more formal document. It is likewise illogical to assume that lawyers' services in the vast realm of wills and estates will be eroded by the limited participation of independent paralegals. Individuals with large estates or those wanting to create a complicated property interest will likely retain a lawyer for the purpose. By contrast, independent paralegals may represent an interesting option to those who would not have retained a lawyer or whose modest means and relatively uncomplicated financial situations allow for the creation of simple wills.

RESTRICTIONS

However, some restrictions should apply to the preparation of wills to ensure that independent paralegals avoid situations of undue complexity. We believe that independent paralegals should be allowed to assist only those consumers whose property includes some or all of the following, but nothing more: home(s); clothing, furniture, and other personal effects; cash and bank account(s); and any insurance policy or policies which the testator wishes to leave to family member(s) or friend(s). In all other situations, the independent paralegal should be required to refer the consumer to a lawyer. The Registrar of Independent Paralegals can be expected to monitor this area of practice closely to identify and resolve any problems that may arise.

c) Uncontested Divorces

EXCLUSION FROM FAMILY LAW MATTERS GENERALLY

Family law services performed by independent paralegals have presented many difficulties for the Task Force partly because of the enormous potential for harm to individuals already rendered vulnerable by marriage or family breakdown. Independent paralegal activity in the area of family law has risen sharply in recent years, and now includes assistance in the preparation of separation agreements, divorce petitions, custody matters, and adoption. We are disposed to move very cautiously in this area of practice because we believe that a conservative approach is warranted. Very often specialized knowledge and sensitive negotiation are required to provide competent legal services in family law matters, and, while there are some exceptions, independent paralegals generally lack the necessary background or experience to provide many of these services. The Task Force therefore recommends that independent paralegals be excluded from most areas of family law practice.

RESTRICTIONS ON UNCONTESTED DIVORCE SERVICES

However, one area of family law practice in which independent paralegals ought to be able to continue to offer services directly to the public is that of uncontested divorces. Nevertheless, even in this area we believe that some major restrictions should be placed on the nature of the service provided. The divorces must be truly *uncontested,* meaning that no issues of disagreement are outstanding between the parties and that the parties have earlier availed themselves of independent legal advice prior to the institution of the divorce proceedings. In all cases, this will also mean that the parties shall have a recent, existing separation agreement before using the services of the independent paralegal to process the uncontested divorce. When the issues between the parties have been dealt with in this fashion, the

actual processing of the uncontested divorce is not likely to be too complicated. Consumers should therefore have the opportunity to choose the services of the independent paralegal for this purpose. The Registrar of Independent Paralegals should be expected to monitor the trends in this area of practice, with a view to developing further refinements if required. At this time, however, we think it is wise to leave the provision of all other family law services exclusively to lawyers.

d) Simple Incorporations

Over the past several years, independent paralegals have offered a limited range of services to clients seeking to incorporate small businesses. We believe that they should be allowed to continue this practice, but only in the following circumstances:

RESTRICTIONS

1. **The business enterprise to be incorporated must be non-public, or privately-held;**

2. **The shareholders must be related by blood or marriage or, at any rate, must be persons who would not be considered members of the public under existing corporate or securities law;**

3. **The directors of the Board must be either shareholders or persons such as accountants or bankers professionally qualified to assume specific roles on the Board;**

4. **The business enterprise to be incorporated must have a net capitalization not exceeding $250,000.00, exclusive of net interest and real property; and**

5. **The business enterprise to be incorporated must be restricted to a single class of shares.**

We assume that individuals or groups presiding over large business entities such as public corporations or businesses with intricate financial arrangements and multiple share structures would not choose the services of independent paralegals. Nor under our recommendations would they be permitted to do so. It is obvious that in situations where more sophisticated corporate and tax advice is required the services of lawyers and other professional consultants, such as chartered accountants, are at once necessary and desirable. Where the business enterprise to be incorporated does not fall within the fivefold criteria elaborated herein, the Task Force recommends that independent paralegals be required to decline to act, referring interested parties instead to lawyers and accountants for consultation and advice.

COMMISSIONING OF AFFIDAVITS AND OTHER LEGAL DOCUMENTS

The Task Force also recommends that independent paralegals be given the authority to commission oaths to carry out the various legal services permitted under the regulatory system proposed herein, but not for any other purpose. The independent paralegals' entitlement to commission sworn affidavits and other legal documents related to their areas of practice will make their work simpler and more efficient and so improve the quality of their participation in Ontario's system for the delivery of legal services.

THE CONVEYANCING OF REAL PROPERTY — AN EXCLUDED AREA OF PRACTICE

The Task Force has also examined in detail the conveyancing of real property as a possible area of independent paralegal practice since the purchase and sale of property provide for some of the most common contacts between consumers and lawyers. Although services relating to the conveyancing of property have been within the exclusive domain of lawyers, paralegals in the employ of lawyers as well as independent paralegals often carry out many of the legal tasks required in the conveyancing process. Moreover, in England, the solicitor's monopoly over conveyancing has recently been removed. The Task Force has concluded that although it would be possible to set up in Ontario a system of independent conveyancers modelled after the English precedent, conveyancing is such a complex area of practice and the attendant risks so high that a more comprehensive regulatory scheme than that proposed for independent paralegals in this Report would have to be devised. However, we would encourage the government in their efforts to streamline land registration through its POLARIS project and to observe this area closely. In the future, economics and consumer demand may dictate that independent paralegals be allowed to enter this field.

CONCLUSION

Excluding the conveyancing of real property, the foregoing areas of practice constitute those activities the Task Force considers appropriate for independent paralegals. They constitute a diverse range of services allowing independent paralegals to make a significant impact on the delivery of legal services in Ontario. They also afford meaningful options to consumers. In

the modest regulatory structure proposed, independent paralegals will have an opportunity to operate along with lawyers in the delivery of specifically defined services. Given the nature of the regulatory process proposed, appropriate refinements and innovations can be instituted as developments warrant.

6

DISCIPLINE AND CONSUMER PROTECTION

INTRODUCTION

Although the Task Force has not uncovered a significant number of abuses, we nevertheless attach the highest priority to consumer protection against incompetent, unscrupulous, or fraudulent practices by the independent paralegals operating in this province. The regulatory system we propose must therefore be structured so as to provide fair but firm legislative sanctions against abuses of the system. Again, we think that the minimalist regulatory format should prevail, and that the disciplinary sanctions adopted should be consonant with the level of risk and potential damage relevant to the service sought by the individual consumer. Consumer protection and disciplinary processes can have marketplace costs associated with them. Like all other aspects of the regulatory model, the disciplinary component must reflect the current reality of this market.

Placing adequate knowledge about the nature of legal services in the hands of consumers is one of the best methods of ensuring that they are aware of the consequences of their selection of an alternative method for the delivery of a legal service. One of the primary duties of the Registrar of Independent Paralegals should be the education of the public concerning the role of independent paralegals in the system for the delivery of legal services. Consumers should have ready access to the Registrar's Office to acquire information about independent paralegals and to air complaints. Such information should be collected, maintained and acted upon in appropriate cases, not only for purposes of dispute resolution but for long term planning as well.

EDUCATION OF THE PUBLIC

TITLE PROTECTION

One of the most basic protections to be accorded consumers and lawyers is that of "title protection" or "title exclusivity". Individuals who are not lawyers must not be allowed or encouraged to pass themselves off as such. Accordingly, all independent paralegals should be required to provide a written release statement to every client. We suggest language such as the following: *"I am not a lawyer, and the same services are available from a member of the Law Society of Upper Canada. I do not have a trust account and these services are not insured against errors and omissions."* The last part of the statement would obviously not be appropriate for those limited services where independent paralegals have been able to secure insurance. In addition, all independent paralegals should be required to provide every client with a written summary statement of their background and qualifications relevant to the provision of the requested legal services.

STANDARD-FORM RETAINER

These two components would comprise, in effect, a standard-form retainer for independent paralegals. Only those individuals registered as independent paralegals should likewise be allowed to call themselves independent paralegals. The certificate(s) of registration must be prominently displayed in independent paralegals' offices. Consumers will then have the minimum necessary information on which to base a decision whether or not to engage the services of an independent paralegal. Failure to provide such information should be cause for the discipline of the independent paralegal.

SANCTIONS AGAINST VIOLATING CONDITIONS OF REGISTRATION

DISCIPLINE

One of the basic functions of the Registrar of Independent Paralegals should be to institute disciplinary procedures against independent paralegals who transgress any of the conditions of their registration. For example, if an independent paralegal were to provide services beyond the scope of those services permitted by the category of registration, one or more of a number of possible disciplinary measures, including reprimand, suspension, or deregistration would follow depending on the individual circumstances. It will be necessary, of course, to provide for procedural fairness in the disciplinary process.

CONSUMER COMPLAINTS

Unresolved consumer complaints of a general nature concerning the quality of service provided by an independent paralegal may be submitted to a process of binding arbitration, at the consumer's option. Complainants should retain the option of using the court system if they so choose.

DISHONEST OR FRAUDULENT PRACTICES

In extreme cases, such as ongoing dishonest or fraudulent activity, the Registrar of Independent Paralegals should have the authority to issue a

"cease and desist" order, or even immediate suspension of the independent paralegal's registration in situations where the public is endangered. A specific statutory offence of a quasi-criminal nature should be enacted for the prosecution of individuals who provide services without being registered under the scheme, in much the same fashion as the unauthorized practice provisions currently operate under the *Law Society Act*. The new statutory offence should be reinforced by the provision for possible injunctive relief against repeat offenders. However, fraud and theft are offences under the *Criminal Code,* and in relation to them it is probably not necessary to create new statutory offences. The criminal process should provide an adequate control mechanism, especially if the Registrar of Independent Paralegals is placed under an obligation to lay an information when such facts come to his or her attention.

The creation of these various elements of control over the provision of services by independent paralegals will promote some measure of consumer protection. While consumer protection could be enhanced further, these measures are commensurate with the nature of the tasks available to independent paralegals. The Registrar of Independent Paralegals must take every opportunity to ensure that the rules and policies of the agency are communicated clearly to both the public and the independent paralegals. Further, some resources must be committed to the policing and enforcement process, if it is to be an effective element of control over the activities of independent paralegals. The regulatory process is not likely to succeed without rigorous enforcement of the rules designed for the benefit of the consumer and the independent paralegals.

ENFORCEMENT

THE ISSUE OF COMPULSORY INSURANCE

Additional measures of consumer protection have also been considered by the Task Force. If instituted, they would have the advantage of increasing the level of consumer protection, but the disadvantage of impeding access by adding what appears to be significant costs at this time. We considered in some detail the issue of compulsory insurance as a requirement of registration. In the current market very few independent paralegals have liability or errors and omissions insurance, although we understand that the POINTTS organization was able to acquire liability insurance after much effort. Still many other independent paralegals have been unable to obtain coverage at competitive premiums. Others simply feel that insurance is unnecessary, given the low-risk services they provide. This is partly due to the fact that from the perspective of insurers in the current market, the risk associated with independent paralegals is difficult to assess. The introduction of a regulatory scheme may give some confidence to the insurers concerning the viability and uniformity of independent paralegal services, but may not make the determination of risk any more certain, at least in the early stages. Such uncertainties will undoubtedly continue to make it difficult to secure insurance.

In our view, then, compulsory liability insurance as a component of the regulatory scheme is unrealistic, at least for the present. The independent paralegal industry would become virtually dependent on the private insurance market. Group coverage may be an alternative, but in light of the novelty of independent paralegal services, and the absence of any developed voluntary association, the securing of liability insurance would still face major obstacles. This approach is also supported by the nature of the areas of practice we would permit for independent paralegals, areas which notably do not include major dealings with real or personal property of consumers where

substantial liability could be incurred. Consumers have already demonstrated a willingness to engage in risk taking by using the services of uninsured independent paralegals in the current marketplace. We conclude, therefore, that consumers will continue to do so in a market controlled by a registration system with some measures of consumer protection, though not compulsory liability insurance.

In drawing such conclusions about the issue of compulsory insurance in the regulatory process, we are not suggesting that independent paralegals be prevented from acquiring such insurance as a matter of business preference. In fact, we think that they should be encouraged to do so. Liability insurance is, after all, protection for the independent paralegals as much as it is for the consumer, who must attempt to process a claim through an often complex system for recovery. Nevertheless, the Registrar of Independent Paralegals should study the possibilities respecting the availability of insurance for independent paralegals, and assess on an ongoing basis the availability of liability insurance and whether or not it should at some future date be introduced into the regulatory scheme.

COMPENSATION FUNDS

We believe that one further element of consumer protection should be added to the proposed scheme for the regulation of independent paralegals. As part of their registration fees, all independent paralegals should be required to contribute to one or both of two compensation funds. An adequate fund in each registration stream should thus be built up with an annual contribution from each registered independent paralegal. The activities performed by independent paralegals are such that claims against the funds

are not likely to be large in number or in value. We expect that these funds would be used principally to compensate clients who have been the victims of fraudulent or dishonest activities by independent paralegals. The funds may also be useful in situations where independent paralegals have ceased operations or left the province without any forewarning to their clients. The funds could be replenished through restitutionary remedies available in the case of successful criminal prosecutions brought against fraudulent independent paralegals.

CONCLUSION

We have concluded that the consumer protection features outlined above offer adequate protection to consumers who choose to use the services of independent paralegals. They also allow independent paralegals the flexibility to maintain efficient business operations and an optional, accessible range of specific services to the consumers of legal services in the province. Title exclusivity, disciplinary procedures of various types, and a compensation fund, combined with the education of the consumer and the availability of information, can provide the matrix of an effective system of consumer protection and regulation.

7

OTHER ISSUES RELATED TO THE ACTIVITIES OF INDEPENDENT PARALEGALS

INTRODUCTION

A series of issues not specifically dealt with earlier in this Report but bearing on the activities of independent paralegals can be conveniently commented on at this time. These issues relate to the current business practices of independent paralegals. We would like to present our views concerning these activities and our recommendations with respect to how they should be dealt with under the future regulatory scheme.

ADVERTISING

The first of these activities is concerned with advertising by independent paralegals. Many independent paralegals advertise their services to the general public, mostly in the print media. Advertising is also a method of recruiting purchasers of independent paralegal franchises. We believe that advertising of legal services provides vital information to the public about the availability and the costs of legal services, and in general such advertising should be permitted. Of course, at present, members of the Law Society of

Upper Canada are permitted to advertise. Indeed, it may not be constitutionally permissible to absolutely prohibit such advertising, even if such a policy were viewed as desirable.

MINIMUM REQUIREMENTS

We have not uncovered much incidence of abuse in the use of advertising by independent paralegals, although the tone of some of the advertising could be elevated somewhat. There are consumer protection laws relating to truth in advertising, and certainly these laws would be available to prosecute independent paralegals who violate these legal requirements. Other than that, we see no reason to restrain the use of advertising by independent paralegals, although the Registrar of Independent Paralegals may want to keep a watching brief on this matter. We would hope that advertising by independent paralegals will reflect the status to which they aspire, and that any voluntary association of independent paralegals would adopt a responsible policy in this regard.

FRANCHISING

The second issue to be considered is that of franchising by independent paralegals. Some large independent paralegal franchise groups presently operating include the POINTTS organization, Ontario Paralegal, and Paralegal Associates. There are also some group operations, such as Action Paralegal, which, while technically not franchises, still have a number of offices staffed by employees. In general, the Task Force supports the principle of franchising for independent paralegals. A properly run franchise operation may generate such benefits for the franchisees as formal training, backup, quality control, and networking. We do not think it would be proper to prohibit the continuation of franchise distribution in the field.

UNSUCCESSFUL FRANCHISEES

However, we have received complaints from some unsuccessful franchisees who felt they did not receive good value for their purchase of a franchise, which can cost thousands of dollars. No franchisor can guarantee the success of a franchise operation, but it is our impression that some franchisees who were unsuccessful may have been led to believe they would receive more support from the franchisor than they did. Moreover, the expectations of some of the purchasers of franchises may have been unrealistic. Operation of an independent paralegal business has not proven to be a path to instant riches, although with determined effort and sound business judgment an adequate income can be achieved. While we support the concept of franchising, we would suggest that the Registrar of Independent Paralegals observe carefully this practice in the industry to ensure that both franchisors and franchisees live up to their obligations. Some specific policy guidelines respecting accountability of the participants might be formulated with respect to this issue after sufficient experience has been gained.

REVIEW AND EVALUATION

VOLUNTARY ASSOCIATION

The Registrar of Independent Paralegals should monitor and assist the development of a voluntary association of independent paralegals. Encouragement of association activities and close cooperation with an association can only make the Registrar a more effective and visible element in the process as a whole. The entire scheme of regulation should receive a thorough review and evaluation after a three- to five-year period to review the operation of the regulatory model as a whole. The status and development of a voluntary association should receive careful review at this time. By the end of the initial period, certain aspects of regulation may be ready for some component of self-regulation. On the other hand, without a more sophisticated

voluntary association, further government regulations in favour of consumer protection and tighter restrictions on the practices of independent paralegals may be necessary. At the outset, however, we are willing, for the most part, to let the consumers, the independent paralegals, and the marketplace develop the appropriate directions which any future regulation should take.

PART III

APPENDICES

APPENDIX A

CONSULTATIONS

American Bar Association

Aron, Bernard — Senior Legal Editor, Carswell Company Ltd.

Austfjord, Lynda M. — Equifax Canada

Cameron, Steve — Lawyer/Chair, CBAO Paralegal Committee

California State Bar — Public Protection Committee

CBAO Paralegal Committee

Chester, Simon — Lawyer, McMillan, Binch

Coburn, David — Medical Behaviourist Researcher

Cochrane, Michael — Lawyer, Ministry of the Attorney General

County and District Law Presidents' Association

Ellis, William — Paralegal

Essex Law Association

Ferguson, Hugh — ACBO Policy Committee

Fox, Mary — Lawyer/Former President, Essex County Law Association

Hohn, Herb — Author of Paralegal Submission to Attorney General, February, 1988

Hunt, Diana — Ministry of the Attorney General, Policy Development Division/Ministère du Procureur de l'elaboration des politiques

Jolly, Stan — Director, Native Court Worker and Native Justice of the Peace Appointment Program, Ministry Attorney General

Kieller, Kim — Lawyer/Chair, Essex County Law Association Paralegal Committee

Law Clerks Institute of Ontario

Lawrie, Brian — President, POINTTS Ltd.

Law Society of B.C. Paralegal Committee

Law Society of Upper Canada Paralegal Committee — Lee Ferrier, Jack Ground, Patrick Ballantyne, Representatives

MacPhee, Natalie — Independent Paralegal

Maidman, Veronica — Toronto Credits Ltd.

Middlesex Law Association

Ministry of Industry, Trade and Technology

Mossman, Mary Jane — Past Chair, CBAO Paralegal Committee

Nancoff, David — President, Ontario Paralegal Ltd.

O'Connor, Terry and Louise Harris — Co-authors, Bill 42, Private Members' Bill for the Regulation of Paralegals

Ontario Paralegal Ltd. and Paralegal Association of Ontario

Owen, John — Credit Counselling Services of Metropolitan Toronto

Schwartz, Alan — Chair, Health Disciplines Committee

Task Force on Access to Professions and Trades

Task Force on Court Reform

Walker, Richard — President, Green Shield of Canada

INTERDISCIPLINARY CONSULTATIONS

Brockett, Margaret — President, Canadian Association of Occupational Therapists

Cagney, Allen — Executive Director, Association of Professional Engineers (Ontario)

Dalziel, Jean — Registrar, College of Nurses of Ontario

DesRoches, B. P., Director of Education, Ontario College of Pharmacists

Dickson, Michael — Registrar, College of Physicians and Surgeons of Ontario

Ferrier, Lee — Treasurer, Law Society of Upper Canada

Fisher, John — Registrar, Ontario Association of Certified Engineering Technicians and Technologists

Johnson-Brophy, Edythe — President, Association of Ontario Midwives

McCorquodale, Shannon — Registrar, Ontario College of Certified Social Workers

Pownall, Kenneth F. — Registrar, Royal College of Dental Surgeons of Ontario

Roebuck, Hiller — Registrar, Ontario Association of Architects

Stolarski, S. — Registrar, Board of Directors of Chiropractors (Ontario)

Wand, Barbara — Registrar, Ontario Board of Examiners for Psychologists

Wolpert, Rhona — Registrar, Board of Directors of Physiotherapy (Ontario)

APPENDIX B

ISSUES FOR DISCUSSIONS AND SCHEDULE FOR PUBLIC HEARINGS

TASK FORCE ON PARALEGALS

ISSUES FOR DISCUSSION

Empirical research has revealed a number of basic conclusions with regard to independent paralegal activity in Ontario. It has been learned that the phenomenon is widespread throughout the Province and it is continuing to grow and attract new members to its ranks. A wide range of legal services is being offerred by independent paralegals including such matters as divorce, immigration assistance, criminal pardons, workers' compensation and other benefits, and many other types. Most consumers seem to be satisfied with the quality of service they have obtained through independent paralegals. There is also some evidence that the fees charged by independent paralegals are lower than those charged by the legal profession for comparable work. On the whole, while there have been some inappropriate acts carried out by paralegals, the perception of the level of complaints has been exaggerated. There are definite concerns about the lack of education and training of most independent paralegals, and very few have been operating for more than a couple of years.

BACKGROUND

The Ontario Task Force on Paralegals was formed in July of 1988 in response to a growing concern voiced through the Office of the Attorney General regarding the provision of legal services to the public by unqualified persons. Allegations of poor quality legal service as well as incompetence and unethical behaviour were made concerning such persons. The Task Force was mandated to study this problem in depth and to make recommendations to the Minister for possible implementation.

The Task Force is currently in the process of holding public hearings regarding the operation of paralegals in Ontario. (A schedule of the public hearings is included with this paper). This short paper is intended to set out some of the critical issues and preliminary findings developed by the Task Force to date, with the intention of providing background to those individuals or organizations who desire to make submissions to the Task Force in its public hearings. In this way it is hoped that this paper will be able to focus discussion at the public hearings on the possible options available to the Task Force in formulating its recommendations.

The purpose of this Discussion Paper is not to set out in any detail the research findings and analysis of the Task Force. The full report will set out these findings in a comprehensive fashion. As well, ultimately the full text of the background research papers will be made available in some form to those interested in the issues.

Initially the Task Force made the decision to focus its inquiry on ***independent paralegals*** rather than supervised paralegals. For many years law clerks and supervised paralegals have successfully carried out legal service activity in the offices and under the supervision of qualified legal practitioners. As well many paralegals have been employed in community legal aid clinics throughout Ontario, as well as in other schemes of government assistance, such as landlord/tenant assistance and the Native Court Worker Program. The Task Force took the position that while there may be some areas of concern respecting the activities of these individuals, because all of these individuals operate in a supervised environment the main thrust of the Task Force's activity should be concerned with independent paralegals who are unsupervised by any legal practitioner and who have direct contact with the public.

The growth of independent paralegal activity in the Province of Ontario is a fairly recent occurrence. Much of this increased activity can be traced to a judgment of the Ontario Court of Appeal called the **POINTTS** decision in 1986. In this decision it was decided that use of the word "agent" in various Ontario statutes should be interpreted to include non-lawyers who represented members of the public for a fee. As a result it was not proper for individuals who engaged in such activity to be prosecuted for acting as a barrister or solicitor under s.50(2) of the ***Law Society Act*** (i.e. "unauthorized practice").

While the **POINTTS** decision had a fairly narrow application, that non-lawyers could represent persons for a fee in a set of specific cicumstances, generally it was interpreted much more broadly. Erroneously reported in the media as a decision which legitimated all the activities of paralegals in the Province, the decision was used to support the growth of paralegals across the Province in areas other than representation as an agent, such as family law matters, simple business incorporations and wills.

Since the **POINTTS** decision the Law Society of Upper Canada has vigilantly pursued prosecution of paralegals who engaged in these other legal service activities, but the growth of such services has continued despite the unauthorized practice sanctions. On May 22, 1986, a Bill was introduced in the Legislative Assembly of Ontario entitled the ***Paralegal Agents Act, 1986*** (Bill 42) in an attempt to regulate the activities of independent paralegals who were permitted to act as agents pursuant to the **POINTTS** decision. Due in part to objections from many interested parties, this Bill was never enacted.

One of the major functions of the Task Force since it began operation has been to sponsor an important empirical research project which examines the present state of affairs with respect to independent paralegals in Ontario. Since accurate information respecting the activities of independent paralegals was not available through other sources, the Task Force had to engage in this research in order to discover the reality of the marketplace with respect to the services of independent paralegals.

Thus far the empirical research has revealed a number of basic conclusions with regard to independent paralegal activity in Ontario. It has been learned that the phenomenon is widespread throughout the Province and it is continuing to grow and attract new members to its ranks. A wide range of legal services is being offerred by independent paralegals including such matters as divorce, immigration assistance, criminal pardons, workers' compensation and other benefits, and many other types. Most consumers seem to be satisfied with the quality of service they have obtained through independent paralegals. There is also some evidence that the fees charged by independent paralegals are lower than those charged by the legal profession for comparable work. On the whole, while there have been some inappropriate acts carried out by paralegals, the perception of the level of complaints has been exaggerated. There are definite concerns about the lack of education and training of most independent paralegals, and very few have been operating for more than a couple of years. Some problems have also been discovered concerning the sale of paralegal franchises.

The basic thrust of the research to date has been the documentation of the phenomenon and an examination of the impact, both actual and potential, on the public and the legal profession. Two major premises respecting the activities of independent paralegals must guide the ultimate recommendations of the Task Force:

TASK FORCE GUIDING PREMISES

1. **How can it be assured that the public has the best possible access to legal services?;**
2. **How can the competence and quality of these legal services be maintained at a level which adequately protects the public?**

Access to legal services and protection of the public interest will be the underpinnings of all of the recommendations of the Task Force.

PROGRESS TO DATE

As the Task Force has been in full operation for approximately ten months, a number of mechanisms have been put into place to assist the Task Force in its work and many of the basic issues have been canvassed. In order to assist those individuals or groups who wish to make further submissions to the Task Force at the public hearings, a brief review of our activities is set out below.

An Advisory Committee to the Commissioner of the Task Force was established in the fall of 1988. It consists of more than twenty representatives of the groups likely to be most directly affected by the recommendations of the Task Force. The Advisory Committee includes lawyers, independent paralegals, a law clerk, a judge, legal educators, a union representative, an economist, government regulators, the President of the Consumers Association of Canada (Ont.), a lay bencher of the Law Society of Upper Canada and others. This body has met three times in the last ten months, and its role is strictly to advise the Commissioner, who is solely responsible for the final report of the Task Force.

At the present time the Task Force has received well over sixty written submissions since advertising its existence in the press, and making available its terms of reference in the early fall of 1988. Submissions have been received from members of the public, independent paralegals, lawyers, various law societies and other lawyer groups, consumer groups, government agencies and others. All of these submissions have received careful consideration by the Task Force.

In addition the Task Force has met privately with numerous individuals and representatives of various groups since its inception. Included in the consultations have been many lawyers and independent paralegals, as well as independent researchers, government researchers and regulators, and the sponsor of Bill 42. Formal oral presentations have been made to the Task Force by the Law Society of Upper Canada, the Canadian Bar Association (Ont. Branch), and The Institute of Law Clerks of Ontario. Public presentations on the role of the Task Force have been made by the Commissioner to the Paralegal Association of Ontario, the Provincial Prosecutors Association and members of the POINTTS organization. In the spring of 1989 a Symposium on the issue of independent paralegals was held at Durham College in Oshawa and attended by the Task Force. Two extensive interdisciplinary consultations were held with representative members of many other professions and sub-professions. Finally, we consulted with representatives of the California State Bar and the Law Society of British Columbia. The Task Force is prepared to meet with any other interested parties.

A major function of the Task Force was to commission in-depth background research papers on critical issues concerning the operation of independent paralegals from recognized experts in the field. Of course, the major endeavour has been the empirical study mentioned in part one of this paper in which the basic outline of the issue in Ontario has been analyzed. Other topics have included an analysis of the various regulatory options available for independent paralegals, the education and training of independent paralegals, an economic analysis of the impact of the operation of independent paralegals, the proper role of unauthorized practice in relation to independent paralegals as well as a few others. The research team has had periodic meetings to jointly discuss their findings and to develop a consistent approach to the issues.

The Task Force will now be holding public hearings in the near future and all interested parties are invited to attend and make submissions. This discussion paper was designed to provide information to those who intend to make submissions to the Task Force. Those persons who wish to make a submission and are unable to attend the public hearings may do so in writing. All comments are appreciated.

OPTIONS

There are a number of alternative courses of action which could be chosen by the Task Force. The first of these is to retain the ***status quo***, whereby independent paralegals are allowed

to be gainfully employed as agents before some minor courts and administrative agencies, but not to provide any other legal services. Because of the concern expressed about the competence of the service being provided by independent paralegal agents, almost no individual or group which has made its views known to the Task Force has argued for retention of the present state of affairs. At the very least, independent paralegal agents should be trained and minimally regulated in some fashion. The Task Force is in agreement with these basic sentiments and can not see how the people of Ontario would be served by continuing on the current path. There is much confusion in the minds of the public concerning the legitimate role of paralegals in the legal services marketplace. Retaining the ***status quo*** would only perpetuate the present confused state.

Another aspect of the present situation which could be maintained would be to allow paralegals to operate only under the supervision of a qualified legal practitioner. This in effect would be to retain the legal status of the present situation, without expanding the range of services available to the public through independent paralegals.

Thus far in its research the findings of the Task Force indicate that members of the public are using the services of independent paralegals, especially with regard to the more routine and "lower risk" legal services where form filling or minimal expertise is necessary. It appears to the Task Force that some gaps in the system of legal service delivery are being filled by the existence of these independent paralegals or "legal technicians". Some public needs are being serviced. As stated earlier in this paper, we have uncovered no generalized abuse of clients by indepedent paralegals.

The evidence gathered to date and the research tend to point toward allowing independent paralegals to operate in some fashion with appropriate safeguards for the public interest. We are not inclined to recommend the abolition of those agents currently appearing within minor courts and tribunals that have received the approval of the Court of Appeal in the **POINTTS** decision. Indeed, these activities appear to be filling an important public need. Furthermore, should such agents and paralegals be allowed to carry out these limited activities, subject to some form of educational requirements and regulation, it would appear illogical to preclude paralegals from carrying out other technical tasks with similar or lesser skill requirements. This would involve setting out specific areas of practice, and establishing education and training programs relevant to these areas of practice. It would be necessary to appoint an individual with the responsibility of overseeing the activities of independent paralegals generally, and managing a regulatory scheme.

We are mindful that to establish a costly and cumbersome regulatory scheme would be to defeat some of the potential benefits of greater access to legal services at a reasonable cost which would be possible through the recognition of independent paralegals. We think that the regulatory system chosen should be the least intrusive necessary to ensure a consistent and competent level of services being offered to the public. Independent paralegals should be viewed as legal technicians provided with the capacity to service the public in a very specific manner in areas of lesser complexity and lower risk. The independent paralegal must also be educated to have the ability to recognize when a particular legal problem must be referred to a fully qualified lawyer.

If you wish to appear before the Task Force on Paralegals in its public hearings in order to comment on any of the issues raised in this paper (see insert), please contact us at the following address:

TASK FORCE ON PARALEGALS

180 Dundas Street West, 22nd Floor
Toronto, Ontario M5G 1Z8
(416) 598-0411/ (519) 253-4232 ext. 2941

Dr. R.W. Ianni, Commissioner

C.J. Wydrzynski, Research Director

D.J. Blonde, Co-Ordinator

TASK FORCE ON PARALEGALS

SCHEDULE FOR PUBLIC HEARINGS

OTTAWA	CHATEAU LAURIER *MacDonald Room* **June 22/89 - 6:30 p.m. - 9:30 p.m.** **June 23/89 - 9 a.m. - 3 p.m.**
LONDON	HOLIDAY INN - DOWNTOWN 300 King Street **June 26/89 - 10 a.m. - 10 p.m.**
TORONTO	CHESTNUT PARK HOTEL 108 CHESTNUT STREET *Bokhara Room* **June 28/89 - 10 a.m. - 10 p.m.** **June 29/89 - 9 a.m. - 11 a.m.**
ST. CATHARINES	HOLIDAY INN 2 North Service Road **July 10/89 - 7:30 p.m. - 9:30 p.m.** **July 11/89 - 9:30 a.m. - 4:30 p.m.**
TIMMINS	SENATOR HOTEL 14 Mountjoy Street South **July 17/89 - Noon - 8 p.m.** **July 18/89 - 10 a.m. - 2 p.m.**
SUDBURY	PETER PIPER INN **July 18/89 - 6:30 p.m. - 9:30 p.m.** **July 19/89 - 10 a.m. - 3 p.m.**
THUNDER BAY	VALHALLA INN Valhalla Inn Road **July 19/89 - 8 p.m. - 10 p.m.** **July 20/89 - 9 a.m. - 2 p.m.**

If you wish to appear before the Task Force on Paralegals in its public hearings, please contact us at the following address:

Task Force on Paralegals
180 Dundas Street West
22nd Floor
Toronto, Ontario
M5G 1Z8

TORONTO - Inge Sardy - (416) 598-0411

WINDSOR - Dolores J. Blonde - (519) 253-4232 Ext. 2941
Doreen Bennett - (519) 973-7066

APPENDIX C

PUBLIC HEARINGS LIST

1. Ottawa — June 22-23, 1989

Brennan, Rodger J. — Lawyer

Burgess, William — Citizens Against Bad Law (CABL)

Charboneau, Diane — Citizens Against Bad Law (CABL)

Clarke, J. R. — Private Citizen

English, Barry — Private Citizen

Forrest, Laurie — Private Citizen

Gardner, Ian — Paralegal

Ham, Elizabeth — Worker in legal office

LaPlante, Alan D. — Paralegal

Loney, Richard — Paralegal

MacPhee, Natalie — Paralegal

Marier, Jean Claude — Law Clinic

McIntyre, Dan — Paralegal

Prefontaine, Marcel J. — Private Citizen

Schowler, Peter — Lawyer/Director, Community Legal Services

Stunell, Judy — Worker in legal office

Sussman, Frederick B. — Lawyer

Tannis, Ernie — Lawyer/Acting Executive Director, Canadian Institute for Conflict Resolution

2. London — June 26, 1989

Baker, Jane — Independent Paralegal

Ellis, Bill — Paralegal

Gardner, Ian — Paralegal

Kelly, Tim — Paralegal

Morton, Al — Injured Workers Paralegal Services

Shumka, Julien — Paralegal

Tillman, Ged. T. — Lawyer

3. Toronto — June 28-29, 1989

Batchelore, Dahn — Paralegal

Burbridge, Nicholas — Institute of Chartered Secretaries and Administrators of Canada

Cassidy, Peter — Lawyer/McQuesten Legal and Community Services

Christoff, Rick — Private Citizen

Copps, Annie — Paralegal

Figi, G. — Lawyer

Gardner, Ian — Paralegal

Ground, Jack— Lawyer/Chair, Law Society of Upper Canada Paralegal Committee

Haggarty, Gerald — Paralegal

Lechum, Brian — Institute of Chartered Secretaries and Administrators of Canada

McKay, John — Lawyer

McClellan, Ross — Director, Legislation and Political Action for the Ontario Federation of Labour

Mitter, Randy — Paralegal

Monson, Mark — Paralegal

Nasir, Mohamed — Paralegal

Nickelson, David — Lawyer, Ontario Nurses' Association

Priest, Ian — Paralegal

Robbins, Larry — Union Consulting Services (Labour)

Sturdy, Jim — Ideological Search House

Szoboszloi, Zoltan — Private Citizen

4. St. Catharines — July 10-11, 1989

Abbey, James — Paralegal

Draper, Ron — Private Citizen

Finkelstein, Sheila — Paralegal, Credit Management

Gardner, Ian — Paralegal

Haggarty, Gerald — Private Citizen

Keith, Michael — Private Citizen

Mates, Michael — Credit Counselling

McDowell, Roderick H. — Community Legal Services of Niagara South

O'Halloran, Christine — Paralegal

Polton, Eric — Legal Counsel, POINTTS Ltd.

Trogrlic, Marta — Paralegal

Walters, Linda — Lincoln County Law Association

5. Timmins — July 17-18, 1989

Ellery, Justin — President, Cochrane District Law Association

Hoskin, Dan — Paralegal

Nancoff, David — Paralegal

Radakir, Paul — Grand Nord Legal Clinic

6. Sudbury — July 18-19, 1989

Bardford, Gloria — Credit Counselling Bureau

Beavis, Linda — Paralegal

Hennessy, Michael — Lawyer

Hill, Chris — Paralegal

Meehan, Patricia L. — Lawyer

Mensour, Michel — Sudbury District Law Association

Monson, Mark — Paralegal

Nancoff, David — Paralegal

7. Thunder Bay — July 19-20, 1989

Edwards, Robert C. — Lawyer

Gardner, Ian — Paralegal

Gibbs, Celia — Consumer's Association of Canada

Haggarty, Gerald — Paralegal

James, Lynda — Consumers Association of Canada

Jobbitt, Keith — Lawyer

McKenzie, Stewart — Paralegal

Monson, Mark — Paralegal

Nancoff, David — Paralegal

APPENDIX D

LIST OF SUBMITTERS

JUDICIARY/TRIBUNALS

Workers' Compensation Appeals Tribunal/Tribunal d'appel des accidents du travail — Elaine Newman

GOVERNMENT

Consumer and Corporate Affairs Canada/Consommation et corporations Canada — Ian R. Nielsen-Jones, Deputy Director of Investigation and Research (Services)/Directeur des enquêtes et Recherches

Ministry of the Attorney General, Office of Crown Attorney, Provincial Prosecutor's Office — Diane M. McAleer, Supervisor, Provincial Prosecutors

Ministry of Industry Trade and Technology, Government of Ontario/Ministère de l'Industrie, du Commerce et de la Technologie d'Ontario — Geoffrey E. Hale, Small Business Advocate

REGULATORY BODIES

Law Society of British Columbia — Dennis J. Mitchell, Q.C., Treasurer

Law Society of Manitoba — Don Macri, Deputy Chief Executive Officer

Law Society of the Northwest Territories — Virginia Schuler, President

Law Society of Saskatchewan — Harvey G. Walker, Chair, Law Society Ad Hoc Committee on Paralegals

Law Society of Upper Canada — Patrick Ballantyne, Staff Lawyer; Donald A. Crosbie, Under Treasurer

Law Society of Yukon — D. Malcolm Florence, First Vice-President

EDUCATORS

Bradley, Julie A. — Instructor, Ontario Business College, Ottawa

Sussman, Frederick B. — Professor of Law Emeritus, University of Ottawa

CONSUMERS/INDIVIDUALS

Batchelor, Dahn Alexander — Rexdale

Brazier, Tom — Toronto

Cameron, Ann — Ottawa

Christoff, Rick — Bramalea

Clark, J. R. — Ottawa

Durand, Rosalynd M. — Ottawa

Fisher, Diane — Windsor

Forrest, Laurie — Ottawa

Fowler, Donald M. — President and CEO, Metalex Investments Ltd., Brockville

MacDonald, Gerard — Richmond Hill

Prefontaine, Marcel J. — Ottawa

Van Tassel, Joseph Peter — Toronto

LAWYERS

Balzer, L. Suzanne — Reid, Sawatzky and Ricci Law Firm, Leamington

Good, Donald B. — Good and Elliott Law Firm, Kingston

Morgan, Robert B. — Eustace, Morgan and Derksen Law Firm, Fort Frances

Nicholson, David — Toronto

Sussman, Frederick B. — Ottawa

Taylor, George, Q.C. — Barrie

Thorsteinson, H. E. — Lancaster, Mix and Welch Law Firm, St. Catharines

INTEREST GROUPS

Amiro, Lisa — on behalf of students registered in the Legal Assistant Programs in the Community Colleges of Ontario

Associated Credit Bureaus of Ontario — Veronica Maidman, Legislative Policy Committee

The Canadian Bankers' Association — Robert G. Turnbull, Assistant Legal Advisor

The Canadian Society for Professional Engineers — Murray McInroy, President

Citizens Against Bad Law

Community Information Agency — Simon Shields

Consumers Association of Canada (Ontario) — Peggy Smyth, President, CAC (Ont.), Celia Gibbs and Lynda James

Credit Counselling, Region of Niagara — Michael Mates, Executive Director

Credit Counselling Service of Metropolitan Toronto — John D. Owen, Vice-President

de Clerville, Roger — Specialist, Divorce Mediation and Family Related Matters

Fundamental Research Institute — Dr. A. K. Ray, Consultant and Advisor

Ideologic Searchhouse Inc.

The Institute of Chartered Secretaries and Administrators

The Institute of Law Clerks of Ontario

Merac Capital Corporation

Ontario Federation of Indian Friendship Centres — Sylvia Maracle, Executive Director

Ontario Federation of Labour (CLC)/Fédération du travail de l'Ontario — John O'Grady, Legislative Director

Union Consulting Services

Victims of Law Dilemma Society, V.O.L.D. Alberta — Garry Watson, Board of Directors V.O.L.D. Association

THE ORGANIZED BAR

Advocates' Society Committee on Paralegals, Report of the Advocates' Society — John T. Morin, Chairman

Canadian Bar Association — Ontario (CBAO)/L'Association du barreau canadien

Canadian Bar Association (National), "Recommendations of the Special Committee on the Status of Paralegals to the CBA Council" — Albert Strauss, Chair

Cochrane Law Association — Justin Ellery, President

County and District Law Presidents' Association (C&DLPA) — John N. McKay

County of Carleton Law Association

County of York Law Association — Peter White, Jr., Secretary

Essex Law Association

Family Law Lawyers' Association of Essex County — Mark Nazarewich, Kim S. Kieller and Jon Dobrowolski

The Middlesex Law Association — G. T. Tillman, Chairman, Committee on Unsupervised Paralegals

Nova Scotia Barristers' Society — Gail Salsbury, Secretary/Treasurer

Provincial Prosecutors Association — Steven J. McGuire, President

Thunder Bay Law Association — Keith J. F. Jobbitt

Welland County Law Association

LEGAL AID CLINICS

Anger, Mary Beth — Community Legal Worker at Community Legal Services of Niagara South, Inc. - Welland

Bailey, Stuart — Lawyer/Director, Nipissing Community Legal Clinic/La Clinique juridique Communautaire de Nipissing

Radakir, Paul — Clinic juridique Grand-Nord, Community Legal Clinic, Kapuskasing

Saint-Aubin, Etienne — Lawyer, Clinique juridique/Legal Clinic, Cornwall

Woroner, Kenny — Student-at-law, Parkdale Community Legal Services Inc., Toronto

PARALEGALS

Action Paralegal Inc. — Ian Gardner, Gerald Haggerty, and Marc Monson, North York

Action Paralegal Studies Program — Toronto

Ark Para.Legal — A. R. Khan, Toronto

Association of Agents at Court — Jack K. Barrow, President

Consolidated Paralegals and Associates — James Abbey, St. Catharines

Davey, Terry — Good News Paralegal Inc., Sault Ste. Marie

Ellis, William C. — Para Legal Limited, Windsor

Gowan, Pearl E. — Hamilton

H. B. Boyd Para-Legal Services — Lindsay

Hyatt/Good News Paralegal — Randall H. Burch, Sault Ste. Marie

Hyatt Paralegal Corporation of Canada on behalf of Hyatt Paralegal Services Franchises of Ontario

Injured Workers' Para-Legal Services — John G. Waram, Lucille Fairley, Alan Morton, Lambeth

Injured Workers' Paralegal Services — London

J. N. Paralegal Services — Janice Newman, Downsview

John A. Bovie Paralegal Services, Lindsay

Kawartha Title Search — Leslie D. Gorwill, Lindsay

Key Paralegal Services Inc. — Heather Daer, President, Etobicoke

Loney, Richard — Nepean

McCloy, Robert — Niagara Falls

O'Connell, Robert — Paralegal and Family Counsellor/Divorce mediator, Toronto

Ontario Paralegal — Christine and Gerald O'Halloran, St. Catharines

Ontario Paralegal Services — R. D. Smith, Belleville

The Paper Chase Paralegal Bureau — David Matheson, Executive Director, Unionville

Paralegal and Associates — Remi C. Gillet, Cornwall

Paralegal Associates — Lynda F. Beavis, Sudbury

Paralegal Association of Ontario

ParaLegal Services, Specialists for Tenants — Dan McIntyre, Ottawa

ParaLegal Society of Canada — Natalie MacPhee, President

Porter, Gary — Waterloo

Singh, Gurdaya — Toronto

Stewart and McKenzie Paralegal Services — Debbie Stewart and Tina McKenzie, Sudbury

Victoria Abstracts Ltd., Conveyancing — Joan D. Hargrave, Lindsay

Walther, Janet R. M. — Waterloo

Windsor Agents at Court — William J. Borshuk, Manager

SUMMARY OF SUBMISSIONS

I. JUDICIARY/TRIBUNALS

Overview

The only submission to the Task Force in this area was from the Workers' Compensation Appeals Tribunal. Their experience with para-professional legal representation of their applicants is limited and uneven, ranging from highly professional to incompetent. As an adjudicative body, the Tribunal does not consider it appropriate for them to bring to the attention of clients the neglect, ignorance or incompetence of their representation.

Training

To deal with the problem of incompetent legal representation the Tribunal attempts to provide basic training for non-lawyer representatives.

Cost/Expense

Newspaper articles presented by the Workers' Compensation Appeals Tribunal highlighted the affordability factor of paralegal representation.

II. GOVERNMENT

Regulation

The Task Force received submissions from both a federal department and a provincial ministry as well as the Provincial Prosecutor's office of Metropolitan Toronto.

All agreed that there was a place for independent paralegals due to information problems, lack of supply of services in isolated communities, and cost and efficiency.

In the Courts of the Provincial Prosecutor's office of Metropolitan Toronto one out of five defendants is represented by a paralegal.

Where the submissions differ is in their approach to regulation. The two governmental agencies recommend a permissive, minimalist approach where market forces should be allowed to govern the provision of legal services, with a requirement of competence and integrity.

In contrast, the Provincial Prosecutor's office of Metropolitan Toronto argued that paralegals cannot continue to be governed solely by market forces. Should there be a gross error on the part of a paralegal, the courts are restricted in dealing with unethical and unscrupulous behaviour. The Prosecutor's office argued that a governing body with licensing requirements must be established. It must have the power to revoke licenses and impose penalties such as suspension or restitution to an aggrieved party.

The governmental bodies did comment that paralegals must meet basic standards of business practice and that government must ensure there is proper recourse if promised services are not delivered.

The interests of consumers, particularly small business, would be best served by permitting a wide degree of choice in legal and paralegal services, not restricting innovation and competition in this marketplace.

The federal *Competition Act, 1986* has general application to confer investigative powers over a profession though it has no authority to regulate a profession.

Consumer protection legislation should be extended to cover all service industries, including paralegals.

In the legal profession, regulation is required because of the information problems and the possibility of high cost errors with no possibility of compensation in damages.

The exclusive right of members of the Law Society of Upper Canada to practise should not be abrogated, but the restrictions on paraprofessionals in law firms should be removed.

Regulatory intervention should be limited to those circumstances in which no equally effective but less costly policy can be developed. The regulatory technique will depend on the cost of information and the error that would arise if paralegals were allowed to practise.

The Market

A permissive regulatory environment would permit both lawyers and paralegals to adapt their services to the changing needs of consumers.

There are serious demand imperfections in the market for legal services in Ontario. Despite the large number of small firms, and the annual

increase in lawyers entering the profession, households and small business consumers have information shortcomings, high costs and insufficient supply in small and isolated communities. As well, government regulation eliminates lower priced competition. As a result, there is a possibility for the profession to control pricing.

Legal services is a growth industry, but the household sector has lower growth rates than governmental or business sectors.

Removal of restrictions on fee advertising would address this problem.

Education

There was a general consensus that Community Colleges and Universities should offer courses in the following areas:

- ethics
- advocacy skills
- procedure
- evidence

There should also be some insurance that an adequate level of English language skills is met, and certification should follow successful completion of a standard province-wide exam.

III. REGULATORY BODIES

The Task Force received submissions from the Law Societies of British Columbia, the Yukon, the Northwest Territories, Saskatchewan, Manitoba and Ontario. Some indicated that the paralegal issue had yet to become a problem in their jurisdiction. There were general conclusions that if paralegals were allowed to operate independently of lawyers they must be regulated for public protection and that, except in limited legislative exceptions, paralegals should not perform legal services.

One Law Society pointed out two areas of concern with the possible regulation of paralegals by a Law Society:

1. there would be public criticism of any Law Society's attempts to put stringent controls in place;

2. the public would perceive paralegals as a type of lawyer and any misbehaviour on their part would reflect on the Law Society.

Other Law Societies viewed the issue of the regulation of paralegals as their professional responsibility whereby law societies must govern independent paralegals by giving them some sort of recognition as well as terms of reference. This group views training or education plus regulation as essential areas of concern. They argue that because paralegals have no training in problem recognition or problem solving it is difficult for them to recognize novel legal problems or the implications of their actions in other areas.

Further concerns were voiced concerning the protection of the public and the fact that unsupervised paralegals do not carry insurance. Because

the private insurance sector does not currently provide sufficient and specific coverage for independent paralegals, the ultimate regulation of paralegals will involve government and therefore the public, in financing regulations to provide the necessary insurance.

IV. EDUCATORS

Only two submissions were received by the Task Force from those involved in the field of legal education. They both supported the concept of the regulation of independent paralegals increasing public access to legal services at reasonable cost.

They emphasized the need for formal training, continuing education, a professional code of ethics and regulation.

V. INDIVIDUALS/CONSUMERS

There was a general level of exasperation and anger towards practising lawyers in the submissions to the Task Force from members of the general public.

Expense

Lawyers were found to be over-priced and prohibitively expensive for the average person.

Some suggested that lawyers should recognize that paralegals are not in competition with them but expand legal services and act as an alternative to the high cost of some solicitors in limited legal service situations.

Monopoly

There was a general consensus that the monopoly of lawyers on legal services must be broken. As one consumer stated, "the legal profession doesn't have a monopoly on intelligence, justice or fairness".

Access to Justice

The submissions generally indicated that independent paralegals increased the public's access to a currently perceived closed and protected self-serving judicial system while lawyers, in turn, remained intimidating. One consumer's experience after retaining a paralegal was an increased level of confidence in the judicial system:

> *I feel I now have an understanding of my rights. I feel confident about what I am doing and I am prepared to go to court.*

What was clear in the submissions to the Task Force from individual consumers was their understanding that both lawyers and independent paralegals have complementary roles to play in the offering of accessible and affordable legal services to the public. An experienced consumer of paralegal services summarized:

> *The role of the paralegal is not that of a shining knight. We leave that to the lawyers. The paralegal plays the role of his client's steed. When the going gets tough, the paralegal will carry his client away to safety.*

Education

Consumers of legal services demanded minimum educational, character and training pre-requisites at either the college or university levels followed by mandatory exams and certification. The standards of education and character should be set to ensure delivery of adequate professional legal services.

Regulation

The majority of consumers concluded that paralegals must be regulated and controlled in the interests of public protection. Market forces are not sufficient control because of the potential serious consequences. They felt that they should be regulated in the interest of public protection and as a means to control "fly-by-night" operators.

A small minority opted for self-regulation combined with a Code of Professional Ethics for independent paralegals.

VI. LAWYERS

Not surprisingly the majority of lawyers making submissions to the Task Force were not in full support of independently operating paralegals. A few pointed out that paralegals did provide reasonable cost alternatives for the fee-paying public and that paralegals, particularly those working within law offices under supervision, have played a significant role in the delivery of legal services.

But independent paralegals working without supervision and without governing legislation caused serious concerns for the lawyers who made

submissions to the Task Force. A paralegal's lack of basic legal knowledge, beyond legal forms, combined with the lack of a regulatory statute, including a binding code of ethics, disturbed lawyers. One lawyer concluded that paralegals only want to do easy uncomplicated legal matters and that paralegals are only suited to do specialized, simplified legal tasks. Without simple, uncomplicated transactions to balance the more complicated less cost efficient matters, most law offices would have to further increase the cost of complicated legal matters. If this happened, lawyers would either have to economize on the more complicated matters or sell themselves as paralegals to compete on the less complicated matters.

One lawyer described paralegals as pseudo-lawyers and held that the POINTTS decision was wrong because the convenience of an agent had been interpreted to allow a full-time agent to pose as a pseudo-lawyer.

The lawyers who presented submissions to the Task Force were in general agreement that there was "no room for semi-trained, semi-lawyers, semi-responsibility with semi-liability." They argued that it was fundamentally inconsistent if two classes of "lawyers" were allowed to practise. One class would have specific training, regulation, ethical standards and specialized insurance coverage while the other unqualified class would not. They generally felt that it would be inconsistent and not in the best interests of the public for the legislature to restrict one group, lawyers, and apply reduced standards to another group.

VII. INTEREST GROUPS

Nineteen interest groups, both directly and indirectly associated with the legal professions, made submissions to the Task Force. All expressed a concern for consumer protection because as the law now stands almost anyone can establish him/herself as a paralegal and offer advice to consumers.

With respect to the delivery of legal services, consumer-oriented interest groups required:

1. access to justice and affordable legal services;

2. choice in the delivery of those legal services;

3. protection of their financial investment;

4. effective redress if something should go wrong in the delivery of these services.

Expense

There is increasing evidence presented in these submissions that consumers do not have access to justice because of the high level, actual or perceived, of lawyers' fees. Consumer-oriented interest groups recommended that even once a regulated paralegal industry is in place there will still be consumers who do not qualify for legal aid and cannot afford a lawyer, yet still require legal services that cannot be provided by a paralegal. They suggested that further study should be undertaken into expanding lower cost dispute resolution mechanisms, mediation and arbitration.

There was consensus that paralegals perform a needed and affordable service though a minority questioned the level of paralegals' fees for the quality of legal services delivered.

Accessibility

Paralegals were perceived by interest groups as being more accessible and less intimidating than lawyers. The paralegal's perspective was believed to be closer to that of the client.

There were requests by different interest groups for controls on both paralegal advertising and an extension of lawyers' advertising methods as methods of improving public access to legal representation.

In the only submission from a native people's legal interests organization, approval was given to the paralegal concept. They felt that the paralegal issue incorporated a more "grassroots" focus resulting in local control and input. It is less bureaucratic, therefore more appealing to people more concerned with arriving at a consensual decision than getting bogged down in "legalese". The institution and recognition of native paralegals in the courts would create further movement in the direction of more self-determined activities by natives on behalf of natives involved in the court process.

Areas of Practice

In most of the submissions made to the Task Force there was agreement that limited specialized areas of practice were appropriate for paralegals. In addition, as argued by the Legal Aid Clinics, there was concern expressed repeatedly about paralegals moving into the area of credit counselling. It was argued that paralegals do not serve the public well, since they charge a fee for a service that is available for free.

It was further argued that paralegals often suggest bankruptcy when there are other options and that their service is inferior since it is unreasonable to assume creditors would give them the cooperation they give a non-profit organization.

Any service available for free, such as debt consolidation services, should be barred from paralegal activity, and if paralegals are to engage in a credit-related business, they must meet the same admission regulatory and fiduciary standards of those in the industry. A suggestion was also made that all commercially operated credit clinics should be banned by the Ministry of Consumer and Commercial Relations.

Regulation

Concern was expressed by some groups that establishing a costly and cumbersome regulatory system would defeat the benefit of a greater access to legal services at a reasonable cost. Therefore, a cost-benefit study may be necessary.

There were conflicting opinions expressed as to the viability of market forces providing all the necessary regulation. A few groups fully supported the concept while others felt that to do so would be an abdication by the government of its responsibility to protect consumers.

Organized labour voiced a concern that legislation to regulate paralegals could have an effect on the ability of unions and employees to have the representation they deserve before labour tribunals. Concern was expressed about the increase in procedural complexity and the resulting delays, increased costs and reduced accessibility.

There was the suggestion of a combination of legislation and a professional association to implement training programs and set up standards and enforcement mechanisms. Legislation should clearly define the domain of qualified legal practitioners.

In general, most interest groups seemed resigned that if there is to be regulation, to be effective as a service for the protection of the public, the regulation must contain:

1. a procedure to evaluate competence at the entry level;

2. commitment to a code of conduct;

3. a process for confirming that competence and ethical behaviour are maintained.

The body administering regulation should have precisely defined objectives, and its activities should be limited to the process of regulation only. Otherwise problems of self-interest are bound to arise.

VIII. THE ORGANIZED BAR

Fourteen submissions to the Task Force from the organized Bar members of the profession negate the opinion that "simple" legal transactions do not require supervision, for they view the lawyer's role in the community to be one of viewing a problem as a whole. They overwhelmingly argue for the prohibition of unsupervised paralegals becauss they feel it is in the public interest to enforce a high standard for the provision of legal services. But, if unsupervised paralegals are allowed, clearly they must be subject to regulation which can only be defined once other requirements are set.

The organized Bar found it pertinent to concentrate on a determination of what a "paralegal" is. They generally defined paralegals as persons who have had some legal training or experience in the law, and who are not members of a regulatory law society, and who offer legal services to the public for a fee but are not qualified to independently practice law in the jurisdictions where they are located.

The organized Bar was also careful to distinguish legal services that may be performed by a lawyer from those which may be performed by a paralegal under the direct supervision of a lawyer.

Submitters from the organized Bar were adamant in their view that disbarred lawyers not be permitted to practise as paralegals should paralegals be permitted to operate independently. They argued that licensing a disbarred lawyer would subvert the discipline process of the Law Society.

Expense

The organized Bar was concerned with the public's ability to assess the quality of service received from a paralegal. They submitted that the cost of the legal bill should not be the only criterion when members of the general public select their desired form of legal service.

The organized Bar examined the cost criteria in choosing between a paralegal or a lawyer and asked:

1. How can it be assured that the public has the best possible access to legal services at a cost the public is prepared to pay?

2. How can the competence and quality of the services be maintained at a level which adequately protects the public at a cost the public is prepared to pay?

It was conceded that paralegals provide a possible short term economic advantage. One Bar Association submitted that paralegals merely address the problem of a shortage of funding for the Ontario Legal Aid Program. Yet another Bar Association argued that there is only a perceived public need for independent paralegals, who are supposed to service a segment of the poor. Thus, legal recognition of independent paralegals would only result in them "playing the role of second class lawyers for second class citizens"!

On the cost issue, the Canadian Bar Association advocated that once the necessary "professional" structure of independently sanctioned paralegals is put into place, any cost advantage they possess over lawyers will disappear.

Only one group among all the submissions from the organized Bar to the Task Force distinguished itself by accepting the proposition that the middle income person can no longer afford the services of a lawyer. This economic reality has led to the proliferation of paralegals. The growing number of independent paralegals indicates that there is a market for their services. In this group's opinion, with education and regulation, paralegals can serve an important function in providing affordable and accessible legal services.

Regulation

The organized Bar submitted proposals for the regulation of paralegals only as their final alternative in lieu of a complete prohibition of independent paralegals. They generally found that paralegals and lawyers are in a similar position with respect to their clients. Therefore, paralegals must be subject to the same public safeguard requirements as lawyers: insurance, a code of ethics, confidentiality, taxing of accounts. Various compositions of a self-regulating governing body were proposed to establish and enforce rules. Lawyers, paralegals and lay persons were suggested for possible membership in such a governing body. A dispute and complaint system should be a part of this self-governing system. One Association argued for the establishment of a code of ethics for paralegals not only between themselves and their clientele but between paralegals and lawyers as well.

The organized Bar distinguished itself in its regulatory submissions to this Task Force by its advocacy of the principle of absolute independence from government. They argued that the practice of law necessitates absolute independence from government as the profession acts as an interface between the interests of individual citizens and the legislature. It would not be in the public interest to have independent paralegals supervised by a government body as this would mean management of a profession which by its very nature must be independent of government. Thus, the organized Bar holds that any paralegal regulatory body should be independent of government control and supervised by the Law Society.

Education

Members of the organized Bar supported a two- to three-year long Community College program with the possible inclusion of a practicum placement with a lawyer to be followed by licensing. They suggested that the Law Society could play a possible role, with others, in the establishment of educational criteria for paralegals.

There were some differences among submissions as to whether the educational criteria of the regulatory environment should be more general or specialized in scope. One group argued that licensing should be based on specialization while another advocated a general education with narrow specializations permitted for only limited certification. Yet another submission proposed that a generalized introductory year should be followed by a specialization stream in either solicitor's work or litigation.

Whether or not a grandparenting clause should or should not be permitted was also disputed. A grandparent clause would permit individuals currently practising to be exempt from full-time education upon passing a set of exams.

IX. LEGAL AID CLINICS

Submissions from both lawyers and legal services professionals from legal aid clinics across the province were received by the Task Force.

Since legal aid certificates are not issued to deal with all legal problems, and clinics have very limited resources, independent paralegals are often the only viable choice remaining for the consumer. Paralegal services address

the gap where consumers of legal services cannot afford a lawyer and are not eligible for the services of a legal clinic.

Those in the clinic system seemed concerned that low income clients might be subject to a greater risk of being taken advantage of than consumers of more complicated legal services. They argued that merely because a legal service appears straightforward it should not be viewed as unimportant. One legal clinic advocated that, "A principle of the legal system in Ontario appears to be that people sitting in the cheap seats do not get a very expensive or elaborate version of the justice show."

Another concern of those from legal clinics who made submissions to the Task Force was that persons who would otherwise qualify for their services, and services provided by legally trained staff or paralegals in the clinics, turn to independent paralegals because they do not know that the legal clinics services were available.

These legal aid clinics made a number of recommendations to the Task Force including:

- Before any services are provided to persons who might qualify for the services of a legal aid clinic in their community, a written notice should be issued advising such persons of this right.

- Education and training in the Community College system should be required, followed by certification examinations and continuing education.

- Ethical standards and disciplinary procedures should be enforced.

- Errors and omissions insurance should be mandatory.

- Legislative regulation and a regulatory body — the Law Society, or the Ministry of Consumer and Commercial Relations, or the Ministry of the Attorney General— should be required.

X. PARALEGALS

As argued by members of the legal profession, government agencies, educators, consumers, regulatory bodies and various interest groups, a market definitely exists for independent paralegals in Ontario. The approximately thirty-five paralegals who made submissions to the Task Force also argued, not surprisingly, that they offer an efficient cost alternative in legal services to the public.

It was argued that the legal system is the only remaining recognized major profession that does not have an independent para-professional structure. A central concern of the Task Force is what is in the best interest of the public. Paralegals generally felt that if the Law Society was really focused on the best interests of the public, they would work together with paralegals. Competent and honest independent paralegals felt as strongly as the Law Society that the public should be protected from dishonest legal practitioners. Their impression was that the Law Society should be less concerned with repressing paralegals and more concerned with improving its public image. With the current legal climate in Ontario, this is an opportune time to enhance and enlarge accessible legal services. Paralegals conceded

that because of their lack of a legal background, there was a danger of disservice to clients but they generally viewed their role as filling the gap between performing simple legal tasks and going to a specialist for advice on complicated legal issues. Paralegals tend to be in agreement that legal advice should only come from lawyers.

As stated, a central issue for the Task Force in regulating paralegals is what is in the public interest. Paralegals argued that the current perception of "public interest" as defined by the Law Society, "composed mainly of prosperous, highly educated and conservative members of the legal profession, may differ greatly from the 'public interest' as seen from the prospective of the public as a whole."

Expense

An independent paralegal offers an economically viable alternative for the person of limited means who does not qualify for legal aid. The paralegals who made submissions to the Task Force felt that they filled the gaps in the legal system by providing affordable services.

One paralegal association argued that lawyers tended to shy away from some areas of law because there was little money to be made there and, as a result, these areas were receiving less than adequate attention. These are areas where paralegals stand to make a significant contribution, providing services at a fee commensurate with the lack of complexity of the service.

Within the cost issue, a number of submissions from paralegals advocated the amending of current legislation dealing with counsel fees to include provision of such fees to litigants who are represented by agents. A

good paralegal should be able to command costs at least as large as a student-at-law.

Education

All submissions from paralegals agreed that since paralegal services impacted on the "whole life" of clients, minimal educational, character and training requirements were necessary.

Some paralegals argued that it was not necessary to require a formal educational background, and the majority agreed that an academic education could be complemented by practical, supervised experience in a law office with lawyers.

Community colleges were recommended with the suggested length of an academic paralegal program running from four months to two years. Continuing education programs were strongly advocated.

Suggested Areas of Paralegal Practice

Paralegals argued that the legal services they provided were essentially what lawyers could not economically provide and did not want to offer. Paralegals perform administrative tasks and do not provide clients with legal advice. The vast majority of paralegals were aware of the very fine line between assistance and legal advice and referred appropriate matters to lawyers for legal advice and services.

There was a repeated request from paralegals making submissions for Commissioner's status to permit greater access for the general public to this service.

Paralegals themselves outlined the areas in which they felt they should not provide legal services. They included areas that require extensive educational background and experience such as Criminal Court, complex estate and trust matters, and contested divorces.

Within minimum regulatory standards paralegals argued that they should be able to act within the following areas:

Provincial Offences Court — This is already allowed by law. A qualified paralegal could give a client a competent defence at an affordable price.

Provincial Court (Civil Division) — The Rules should be modified to accommodate paralegal practice. The limit in Small Claims should be raised to $10,000.00 as suggested by the Zuber Report. Paralegals are specialists in Small Claims Court and their services are less expensive than lawyers'.

Provincial Court (Family Division) — Under the *Courts of Justice Act*, paralegals are allowed to appear with the special permission of the judge. This should be expanded to allow paralegals to appear unless ruled incompetent by a judge.

Summary Landlord and Tenant Matters — Housing considerations suggest there is a need for individuals with expertise in this area.

Immigration — Appearances by agents are already authorized by the *Immigration Act*.

Unemployment Insurance — UIC recipients do not have the means to retain lawyers.

Summary Convictions — Agents are permitted to act for a fee.

Workers' Compensation — The intent of this program was to discourage the need for litigation by instituting a no-fault arrangement. Paralegals materially promote this intent, and the system becomes less costly and more responsive.

Labour Relations — This is already a field for non-lawyers. Paralegals are particularly suited to arbitration hearings.

Coroner's Inquest — Paralegal activity is well established.

Construction Lien Matters — Paralegal activity is well established.

Surrogate Court — Paralegal activity is well established.

Change of Name — Paralegal activity is well established.

Title and Name Search — Paralegal activity is well established.

Uncontested Divorce — The *Divorce Act* authorizes paralegals to appear on behalf of a spouse. One purpose of the *Divorce Act* is to make divorce simpler, faster, and cheaper. It virtually invites involvement of paralegals. Paralegals would be involved where both spouses are in agreement, or where no answer is filed in time. Paralegals would be allowed to commission affidavits required in obtaining a divorce, and to prepare and file Petitions for divorce.

Simple Wills — To the paralegal, a will is a specialty, not a loss leader. Therefore, they will presumably do a good job and will make this important document more available to the public. Simple will service could include an Affidavit of Execution of Will or Codicil, commission status, preparation of a Codicil and appointment of a Power of Attorney.

Simple Incorporation — Government publications make it very easy for people to incorporate themselves without the advice of a lawyer. Tax implications are not a legal matter per se, rather an accounting matter. Paralegals should be able to offer simple incorporations to the public.

Real Estate — Paralegals can provide effective efficient services in routine real estate matters, many of which are currently being provided by legal secretaries.

APPENDIX E

ADVISORY COMMITTEE MEMBERS

Belaire, Michael — Independent Paralegal

Bocking, James H. — Acting Deputy Director of Investigation, Research (Services), Bureau of Competition Policy Consumer and Corporate Affairs of Canada

Bohnen, Linda S. — Counsel for Professional Relations Branch, Ministry of Health

Cameron, Stephen — Barrister and Solicitor

Day, Midge — Teaching Master, Durham Community College

Feinberg, Joyce — Director of Policy Development, Ministry of Consumer and Commercial Relations

Ferrier, Lee — Treasurer, Law Society of Upper Canada

Gill, Sym — National Representative, Research Dept., Canadian Auto Workers

Gillese, Eileen E. — Professor, University of Western Ontario

Graham, Netty — Lay Bencher, The Law Society of Upper Canada

Ground, Jack — Chair, Law Society of Upper Canada Paralegal Committee

Harrison, Adeline — President, Institute of Law Clerks of Ontario

Hogan, Mary — Judge, Provincial Court, Criminal Division

Lawrie, Brian — President and CEO, POINTTS Advisory Limited

Ligeti, Eva B. — Program Co-ordinator, Legal Assistant Program, Seneca Community College

McKay, John — Chair, Paralegal Committee, County & District Law Presidents' Association

Mossman, Mary Jane — Professor of Law, Osgoode Hall Law School

Nancoff, David — President, Ontario Paralegal Limited

Owen, John D. — Vice President, Credit Counselling Service of Metropolitan Toronto

Smyth, Peggy — President, Consumers Association of Canada (Ontario)

Stager, David — Professor, Dept. of Economics, University of Toronto

APPENDIX F

RESEARCH CONSULTANTS, TOPICS, AND SUMMARIES OF PAPERS

1. "An Empirical Profile of Independent Paralegals in the Province of Ontario" by:

   W. A. Bogart, Professor of Law, University of Windsor —
   Neil Vidmar, Dept. of Psychology, University of Western Ontario and Duke University Law School

2. "Unauthorized Legal Practice Prosecutions and Independent Paralegals in Ontario and the United States" by:

   John A. Flood, Assistant Professor of Law, Indiana University
   Frederick H. Zemans, Professor of Law, Osgoode Hall Law School

3. "Potential Regulatory Mechanisms for Independent Paralegals" by:

   Eileen Gillese, Professor of Law, University of Western Ontario

4. "Report on the Education and Training of Independently Practising Paralegals" by:

   Neil Gold, Dean, Faculty of Law, University of Windsor

5. "Constitutional Aspects of Access to Law" by:

   Noel Lyon, Professor of Law, Queen's University

6. "Independent Paralegals and Insurance" by:

   Julio Menezes, Professor of Law, University of Windsor

7. "Economic Issues Relating to Independent Paralegals" by:

   David Stager, Professor, Dept. of Economics,
   University of Toronto

8. "Conveyancing and Independent Paralegals" by:

   John Wilson, Associate Professor of Law, University of Windsor

AN EMPIRICAL PROFILE OF INDEPENDENT PARALEGALS IN THE PROVINCE OF ONTARIO

by W. A. Bogart and Neil Vidmar

I. PURPOSE AND GOALS

This study is an empirical profile of independent paralegals and their activities in Ontario, with emphasis upon the following:

- the number of independent paralegals currently practising in Ontario
- the legal services they are providing
- the fees charged by paralegals compared with lawyers' fees for the same legal services
- the extent to which independent paralegals increase access to legal services for consumers
- the awareness of consumers to the services offered by independent paralegals
- the level of consumer satisfaction and consumer complaint with the services of independent paralegals as compared to lawyers' services.

II. RESEARCH STRATEGY AND METHODS

The data base for the empirical profile consists of the following:

1) newspaper accounts

2) submissions to the Task Force

3) the survey of administrative agencies undertaken by the Law Society's Special Committee on Paralegals

4) the Law Society's files on unauthorized practice

5) interviews with paralegals

6) interviews with the clients of paralegals

7) interviews with persons knowledgeable about paralegals, such as lawyers and officials of government agencies and courts

8) a community survey.

The research consultants assessed the relative strengths and weaknesses of each of the eight data sources and proceeded on the assumption that none of these data sources taken alone could provide a reliable or comprehensive profile of paralegal activity.

The use of all the data sources provided a reliability check. If two or more sources agreed, the researchers considered the conclusions to be more reliable. If two or more sources conflicted, the researchers considered that there might well be problems of interpretation. In general, the profile of paralegal activity emerging from this study appears to be representative, broad in scope, and consistent across all data sources.

1) Newspaper Accounts

In 1986, controversy over independent paralegals began to be reported in Ontario newspapers. Altogether, the Task Force collected 75 such articles on the subject of paralegals. In addition, the *Ontario Lawyers Weekly* carried 19 articles on the subject between October, 1985 and January 20, 1989. Newspaper articles provide background and details but are usually selective in what is covered and subject to any biases of the reporters and editors.

The researchers also conducted a search of the classified sections of the *Windsor Star*, *Kingston Whig Standard*, the *Sudbury Star*, the *Peterborough Examiner*, the *Thunder Bay Chronicle Journal* and the *Ottawa Citizen*. These data provided information on where and when paralegals advertised their services in newspapers as well as information on the types of services offered.

2) Submissions to the Task Force

The research consultants analyzed and assessed 50 submissions to the Task Force on the subject of paralegal activity.

3) The Survey of Administrative Agencies Undertaken by the Law Society

On January 13, 1988 the Law Society instructed a Special Committee on Paralegals to canvass various tribunals to determine for each tribunal:

a) whether or not non-lawyers are allowed to appear before the tribunal as agents;

b) the qualifications required of the non-lawyers;

c) the education or training that ought to be required of such persons; and

d) whether or not the tribunal prefers only lawyers or articling students to appear.

The following administrative agencies replied to the Law Society's survey:

- the Social Assistance Review Board;
- the Ontario Highway Transport Board;
- the Ontario Labour Relations Board;
- the Ontario Municipal Board;
- the National Parole Board;
- the Workers' Compensation Board;
- the Immigration Appeal Board;
- the Workers' Compensation Appeals Tribunal;
- the Ontario Securities Commission;
- the Assessment Review Board.

4) The Law Society's Files on Unauthorized Practice

The research consultants had access to the Law Society's complaint and prosecution files which their Unauthorized Practices Division had classified as "open". They also examined a random sample of closed files. Professors Bogart and Vidmar found that the Law Society's record keeping has been informal.

Lacking sufficient time and resources, the research consultants were not able to address the issue of comparability. In examining inadequate performance by paralegals, the researchers were not able to examine the activity of lawyers for comparable services.

In the context of legal practice, inadequate performance is controlled by the profession itself through codes of ethics, insurance, and sanction by the Law Society. An appropriate regulatory framework could likewise be considered for paralegals.

5) Interviews with Paralegals

The consultants interviewed 45 paralegals, each of whom was contacted by the random drawing of names from a list of paralegals who attended a meeting of the Paralegal Association of Ontario, a voluntary interest group.

They also randomly interviewed parties from a list of paralegal franchises and from names of paralegals supplied by the *London Free Press* and the *Windsor Star*.

Some paralegals, specializing in immigration matters, were identified and contacted by way of the yellow pages of the Toronto telephone directory

and from advertisements. These paralegals tend not to belong to franchises or to the Paralegal Association of Ontario.

All of the persons contacted agreed to be interviewed.

6) Interviews with the Clients of Paralegals

The consultants interviewed 39 clients of paralegals. Each of the 45 paralegals interviewed by the consultants was asked to allow 15 files to be examined so that the research consultants could obtain the names and numbers of clients for interview purposes. Only 14 of the paralegals would permit the research consultants to see their files. Confidentiality was the most common reason given.

Out of this limited pool a number of clients could not be reached. Given these constraints on selection, there are limits on the ability to generalize about paralegal clients. However, since a number of client interviews did uncover complaints about and feelings of dissatisfaction with the paralegals' service, the researchers are inclined to conclude that the sample was not entirely skewed toward satisfied customers.

7) Interviews with Persons Knowledgeable about Paralegals

The researchers elicited views on paralegals and their activities from a number of sources, including

- provincial court judges;
- immigration officials;
- Justices of the Peace;
- lawyers.

8) Community Survey

The researchers conducted a telephone survey in metropolitan Toronto between May 23-30, 1989 to obtain an estimate of the number of people in the general populace who are potential or actual clients of paralegals and lawyers. The persons contacted were asked whether or not they had ever been involved in the legal process and, if so, whether they preferred to act on their own or with the help of a lawyer or paralegal.

If legal assistance had been sought, the survey sought to determine the cost of the service, and the degree of satisfaction with it. In cases where a paralegal's services were sought, the survey sought to determine the reason(s) for the choice.

The survey provided demographic information on each respondent: age, education, occupation, household income, and the principal language spoken in the home.

The particular value of this survey methodology is that, because it is done through random sampling, the results tend to be representative of the population. Because one member of a household is permitted to answer for all, more individuals are captured. A corresponding weakness is that reports of activities are dependent upon the respondent's memory and the respondent's knowledge of the activities of other household members. Moreover, the survey was carried out on residential households; little relevant information may have been uncovered relating to incidents of the use of paralegals or lawyers in business transactions. The survey was conducted in English only and only within metropolitan Toronto, thus placing obvious limits on generalizability. On balance, these factors possibly work in the direction of

underestimating the extent of paralegal activity. The survey provides information on paralegals' specific legal activities and consumers' satisfaction with the services of both lawyers and paralegals.

III. THE LANDSCAPE OF PARALEGAL ACTIVITY

1) The Number of Paralegals and Their Increase in Recent Years

It is difficult to determine the exact number of paralegals in Ontario. The survey of newspaper advertisements suggests a marked increase in advertising by paralegals since the early 1980's, particularly outside of Toronto. The interviews of paralegals indicated that more than half have been operating for less than two years. A minority have operated longer than five years.

In Provincial Offences Court in the Judicial District of York, one out of five defendants is represented by a paralegal.

Possible reasons for this growth include the following:

a) lawyers abandoning such areas of practice such as Small Claims Court and Provincial Offences Court;

b) simpler divorce proceedings;

c) the raising of the monetary jurisdictions of the Small Claims Court;

d) the prominence of advertising by paralegals relative to advertising by lawyers;

e) the POINTTS decision "legalizing" a number of activities engaged in by paralegals and bringing attention to their very existence.

2) The Activities of Paralegals

Interviews with paralegals suggest that the heaviest concentration of activity for individual paralegals is in the areas of highway traffic offences, immigration and divorce matters and, less frequently, in workers' compensation applications, landlord and tenant issues, and Small Claims Court cases.

3) Transaction Incidence and Paralegal Usage

How frequently are paralegal services used in relation to the number of legal transactions for which paralegals might provide their services? The community survey asked respondents whether any members of their households had engaged in any of 12 different areas of activity within the past three years:

- will drafting
- property transaction
- immigration problem
- divorce petition
- separation agreement
- incorporation
- Small Claims Court
- summary traffic offence

- landlord and tenant dispute
- workers' compensation
- application for various benefits
- request for pardon.

A total of 606 such activities were reported. Paralegals were used in approximately 2% of cases and personally hired lawyers were used in 37% (225 - 606) of cases. Statistics indicate that lawyers were 18.5 times more likely to be hired than paralegals.

IV. THE BACKGROUND, TRAINING AND ORGANIZATION OF PARALEGALS

1) Background and Training

Very few of the paralegals interviewed have a formal education in law. In some instances, former employment provided a relevant background to the activity carried out by the paralegal, such as former police officers becoming paralegals defending charges under the *Highway Traffic Act* and former employees of the Department of Employment and Immigration becoming immigration consultants. A number of paralegals had prior experience in small businesses or held management or teaching positions before becoming paralegals.

2) Continuing Education

There appears to be no formal, systematic way paralegals can participate in continuing legal education. Paralegals who are members of franchises or associations can avail themselves of a limited number of programs and notices to assist in keeping current. Some paralegals have referred to their participation in York University's "The Law and You", a non-credit course series, as a way of suggesting an air of professionalism that is not warranted.

A number of paralegals subscribe to reporting services and manuals in their areas of practice. Others say that they rely on court officials or department officials to keep them up-to-date in changes in documents and forms.

3) Structure of Paralegal Operations

Over two thirds of those interviewed work full-time as paralegals. For those who work part-time, a substantial amount of their occupational activity (20-50%) is spent as a paralegal.

About two-thirds of the individuals interviewed operate with no formal connections to any other paralegals, except for those belonging to the voluntary organization, the Paralegal Association of Ontario.

Most paralegals work in offices by themselves, although a very few work in groups of two or three. About half have employees, most often one part-time person.

Just over half of the paralegals are incorporated. Until very recently, none carried errors and omissions insurance. The POINTTS franchise acquired such insurance in April of 1989.

Most full-time paralegals work about 40 hours per week, but some claim to work between 60-70 hours. The range of client interviews per week appear to be from 5 to 15. It is very difficult to ascertain paralegals' incomes. The research consultants' overall impression is that the livelihoods of individual paralegals (as opposed to franchisers) range from a solid, but not affluent living, to the edge of insolvency.

4) Relationships with Lawyers and other Paralegals

The researchers are unaware of any formal relationships between paralegals and lawyers whereby a lawyer oversees the work of an independently practising paralegal. The antipathy expressed by many lawyers for paralegals and the perception that the Law Society may sanction any lawyer cooperating with paralegals have no doubt had an impact. Approximately 50% of the paralegals report that they have established informal relationships with lawyers for the purpose of asking them questions concerning issues they are dealing with.

Virtually all paralegals say they refer work to lawyers when matters exceed their competence.

Paralegals also refer work to other paralegals when issues arise in areas in which the paralegal does not provide services. But 33% of the paralegals say that they never refer work to other paralegals.

About 66% of paralegals interviewed say that some of their business comes from lawyers but that the number of these referrals is quite small, only reaching 20% of all businesses in two instances, and, for the most part, being 50% or less.

5) Attitudes Toward Regulation

Paralegals interviewed are overwhelmingly in favour of some sort of licensing or registration. Only three indicated opposition. There is a general desire to be regulated in some fashion as a kind of trade-off to prevent the Law Society from continuing its use of the powers of prosecution.

V. CLIENTS

1) Profile of Clients

Although a substantial number of paralegals indicate that their clientele is "poor", "working class", or "blue collar", many also suggest that they represent the middle and even upper classes. Some of this reported diversity may be due to attempts by paralegals to associate themselves with those of higher economic status.

Most paralegals seem to draw clients from a wide variety of ethnic backgrounds, although understandably those who can speak languages in addition to English have a greater concentration of ethnic clients.

2) Sources of Clients

Very few paralegals indicate that lawyer referral is a substantial source. Most paralegals suggest that the bulk of their business comes from word of mouth.

Almost all paralegals engage in some form of advertising.

Interviews with clients appear to corroborate the assertions of the paralegals; the clients report that they retain paralegals either in response to advertising or because of word of mouth.

3) Why Clients Use Paralegals

Paralegals believe that there are three major reasons why their services are sought over those of lawyers:

a) cheaper fees;

b) the public's perception that paralegals are more responsive and have a greater degree of specialization because of their focus on a particular area (eg. Small Claims Court, Highway Traffic Court matters);

c) the public's mistrust of lawyers because they are not candid about their fees and take a long time to complete their services.

These responses have been corroborated by the clients interviewed. Most clients seem convinced that paralegals are less costly and more responsive and attentive to their clients. Frequently mentioned are paralegals' speed, care with detail, attention to their clients, and their practice of not delegating matters so that clients deal only with the paralegals whose services are retained and not with underlings. These reactions are qualified by a number of clients who state that they have only used the paralegal because the matter is simple and uncomplicated; if the matter involves some complicated issues the services of a lawyer will be used.

About half of the clients interviewed have used a lawyer before.

4) Clients' Understanding that Paralegals Are Not Lawyers

There are documented instances in Law Society files indicating that paralegals have either inadvertently or deliberately held themselves out as lawyers.

Most paralegals interviewed by the research consultants say that they offer obvious and explicit indicia (signs in offices, statements in written materials, and so on) that they are not lawyers and do not hold themselves out as lawyers.

VI. FEES

The researchers have concluded that:

a) There is no practical way of comparing quality of service between paralegals and lawyers or even among paralegals or lawyers.

b) Outside those provided by storefront offices, such as those of Jane Harvey Associates, there is no master list of the fees charged by lawyers.

c) Even when estimates of costs are obtained, it is often difficult to distinguish fees from disbursements.

Paralegal interviews, printed price schedules, client interviews and an examination of the Law Society files provided information concerning fees charged by paralegals.

The general conclusion drawn is that, on average, paralegals charge less than lawyers. The size of the difference, however, varies across types of services.

One lawyer who was in a storefront legal practice and has since returned to a more traditional practice says that paralegals are less expensive.

Paralegals' fees are greater than those charged in legal aid clinics or in legal aid certificates. Yet many people who qualify for legal aid assistance continue to use the services of paralegals. Some individuals do not avail themselves of legal aid, apparently because of aggressive paralegal advertising, the presence of paralegals in the ethnic communities, general ignorance of the availability of legal aid and clinics, and the stigma of legal aid as a form of welfare.

VII. FRANCHISES

While a number of paralegal franchises may be operating in Ontario, the three most prominent and whose franchisees the researchers interviewed are:

- POINTTS Ltd.
- Ontario Paralegal Ltd.
- Paralegal Associates Ltd.

All three franchises have similar provisions governing the relationship between the franchiser and franchisee, and these provisions have much in common with those governing any franchiser-franchisee relationship. The nature of this relationship is set out in detail in this study.

There is nothing about delivering paralegal services through the vehicle of a franchise which appears to have a significant impact on such characteristics as speed, cost and quality. Nothing in the various data sources links quality of service (good or bad) particularly to franchises. Complaints against franchisees exist, and franchises have been the subject of investigations

and prosecutions by the Law Society. But the data indicate that the volume and intensity of complaints by consumers are not disproportionate against franchises. And there is no strong evidence suggesting that a client who goes to a franchisee necessarily gets better service in terms of speed, cost and quality compared with other paralegals delivering competent service.

Ontario Paralegal Ltd. is alleged by some to have sold franchises to parties financially or otherwise incapable of carrying out the responsibilities, thus leading to a kind of revolving door in the market. However, the researchers found no hard evidence to substantiate this charge. On the other hand, the researchers did interview a number of people presently or formerly associated with Ontario Paralegal who complained about the advice and training they received or who have discontinued or plan to discontinue operating for a variety of reasons, including financial incapacity.

Even if the allegations about problems between franchisers and franchisees are substantially true, eliminating the franchise as a vehicle for delivery of paralegal services is a separate issue. Franchising is essentially unregulated in Ontario and depends on market forces for its vigour. So long as consumers are receiving adequate service, it may be appropriate to allow franchisers and franchisees to work out arrangements between themselves based on bargaining strength and market acuity.

VIII. THE QUALITY OF SERVICES

There are indications that some work by paralegals clearly falls below any acceptable standard. The researchers posed the following questions for study:

a) How typical is such behaviour of the day-to-day activities of paralegals? and

b) What are the implications of such behaviour in terms of the need for and nature of regulation?

The Law Society's submission to the Task Force presented eight critical examples of paralegal incompetence, each of which is outlined in this paper.

Interviews with paralegals also revealed complaints about quality of service but of a much more modest scope than those presented by the Law Society from its files. No paralegal stated that he or she was involved in a lawsuit concerning professional services. Very few paralegals reported problems relating to quality of service, although many making this assertion had been in business only a short time.

When problems relating to competence of service have arisen, the following are the ways in which they have been handled:

a) in some cases, some or all of the fee has been returned if a client is dissatisfied with the result, i.e., loss of a case;

b) in one franchise, the contractual agreement states that the franchiser can arbitrate on any matter that is not provided for in the agreement, such as public complaints;

c) another franchiser stated that when a franchisee gets a complaint he/she is advised to telephone head office immediately and register the complaint so the franchiser is prepared;

d) the voluntary organization, the Paralegal Association of Ontario, also has a complaint process. The Association contacts the franchiser on a complaint and asks the franchiser to deal with it.

Another source of data of paralegal performance is the opinion of those before whom paralegals appear as advocates and those who appear as advocates on the other side of a case represented by a paralegal. The Law Society conducted a survey of administrative tribunals before which paralegals appear. The Law Society's summary of the administrative tribunals' reactions to paralegals strike the research consultants as accurate:

> *[I]t was the unanimous view of the tribunals that it would be inappropriate to restrict those permitted to appear before them to the members of the Bar. Nevertheless, it was the almost unanimous view of these tribunals that persons appearing before them should undergo some form of training in advocacy as well as in the specific legislation with which they are dealing.*
>
> *(From the submission of the Law Society of Upper Canada to the Task Force)*

In the limited number of interviews with judges and Justices of the Peace, the research consultants found general support for paralegals though

reservations were expressed about some paralegals in particular circumstances. The respondents tended to conclude that there is a place for regulated paralegals.

By examining submissions to the Task Force from individual members of the public, the researchers found high support for paralegals as an alternative provider of legal services for simple legal problems. Most clients indicated that they were satisfied with paralegal services, and many indicated that they were very satisfied and spoke highly of the paralegal. Most clients considered paralegals' fees fair and less expensive than those that would have been charged by a law firm. Finally, the telephone survey of households revealed that persons using lawyers and paralegals registered high levels of satisfaction with the services provided by each.

The research reveals that individuals go to legal experts for assistance with problems precisely because the experts have knowledge and skill the individual does not have. Thus, it may be difficult for the individual to accurately assess the level of competence if the error relates to something the individual does not understand. The Law Society argues in its submission to the Task Force that the average citizen cannot determine whether he or she requires the services of a lawyer and cannot be expected to know whether the paralegal retained has adequately performed a legal task.

There is some force in this contention, particularly when it is considered in conjunction with the data indicating that paralegals themselves may not, in some situations, appreciate the boundaries of their competence.

There are a number of ways that paralegals limit what they do. POINTTS paralegals limit themselves to Highway Traffic matters. Most paralegals involved with divorce proceedings limit themselves to uncontested divorces. The difficulty is in determining if a divorce is uncontested. Some paralegals use a "no assets, no children, no contest" test. Others require that the would-be client produce a separation agreement drafted by a lawyer. Most immigration consultants seem to draw the line on anything to do with court review. Small Claims matters are limited by the $1,000.00 - $3,000.00 ceiling.

Generally, paralegals insist that they only follow client instructions and fill out forms, but refrain from proffering legal advice.

One particularly disturbing response illustrates an inclination among many paralegals to limit responsibility by insisting that clients make all the decisions:

> *He did create a separation contract, and believes he was prosecuted [by the Law Society] for, primarily, acting as a lawyer.* ***He had the client agree that the contract was only good as long as both parties agreed to its terms. Before the prosecution he would write down only what it was the clients said they wanted but he won't do that now.*** *(emphasis added)*

Some paralegals who fail to purchase liability insurance believe that because they are not lawyers, they do not give legal advice, and because the client always makes the final decision about what he or she wants, they cannot be successfully sued.

Concerns about the proper merits of the paralegals' role and how best to discharge it — expressed by some paralegals themselves — suggests that if a regulatory scheme were recommended by the Task Force it should address such issues as limits upon activities, training, continuing education and ethical standards.

IX. PROSECUTIONS FOR UNAUTHORIZED PRACTICE

The development of a detailed profile of prosecutions for unauthorized practice was high on the research consultants' list of priorities because it played a central role in the controversy over paralegals.

The Law Society has indicated that there are increasing complaints about and much evidence of incompetence and malfeasance among paralegals. Paralegals have countered that there is a systematic attempt to drive them out of business through threats and intimidation and that the pace of intimidation escalated after the creation of the Task Force.

The research consultants inspected thoroughly the Law Society's 155 "open" files on complaints and prosecutions.

1) The Law Society's 155 "Open" Files

a) True Files and Minimal/Irrelevant Files

A total of 68 of the 155 files can be classified as minimal or irrelevant. Therefore there are only 87 "true" files, that is, files that pertain to paralegal matters and involve more than simple notations of possible paralegal activity.

b) Disbarred Lawyers

13 files relate to disbarred lawyers who allegedly continue to provide legal services.

c) Mentally ill Persons

2 of the files involve mentally ill persons who have represented themselves either as lawyer or legal consultant.

d) Complaints Unfounded or Withdrawn

In 7 cases the complaint about unauthorized practice was deemed without foundation, either because there was no evidence that unauthorized legal services had been provided or because the person was acting under the supervision of a lawyer.

2) Who Initiates Complaints and Why?

The data show that complaints about paralegal activity come primarily from lawyers, not clients.

It is noteworthy that in about half of the client-initiated complaints the file contains multiple complaints. Thus, more than one of the paralegal's clients complained. The bulk of these complaints allege incompetence or fraud.

Lawyers' complaints related to the following incidents:

a) paralegals' advertisements;

b) a paralegal sending a letter to a lawyer or accounting firm soliciting a reciprocal referral agreement;

c) a lawyer discovering, after acting for one party in a two-party transaction, that the agent for the other party was not a lawyer.

Lawyers have also expressed concern about the effect of paralegal activity on their "client base".

They also suggest that they are exposing themselves to malpractice suits if they accept work of a paralegal, or that they risk censure by the Law Society if they deal with paralegals. Some lawyers fear that clients' needs are not being met by paralegals.

3) The Nature of Complaints: Quality of Services

a) Fraud on Client

In 4 instances, there were complaints that paralegals attempted to defraud clients.

b) Incompetence

5 files contain allegations of incompetent services.

c) Misrepresentation as a Lawyer

14 files contain allegations that paralegals have misrepresented themselves as being lawyers.

In 3 of these cases there appears to be some documented evidence that the paralegal actually stated he or she was a lawyer, either to clients, or to the court, or to officers of the court.

d) False Statements to the Court

At least 6 files indicate that false statements were made to the court.

4) The Nature of Complaints: Areas of Law

Complaints were made in the following areas of law:

a) Traffic Offences — 16 complaints

b) Wills — 48 complaints

c) Incorporation — 53 complaints

d) Divorce/separation — 67 complaints

e) Real Estate — 27 complaints

f) Immigration — 8 complaints

g) Landlord/Tenant — 26 complaints

h) Benefits — 5 complaints

i) Tax Assessment — 4 complaints

j) Small Claims — 30 complaints

k) Other — 50 complaints

5) Fraud/Incompetence versus Unauthorized Practice

The files reveal that the same individual is accused often of fraud or incompetence or unauthorized practice. Of the 155 "open files", 22 or 14% involve such allegations. The remaining 86% involve complaints that the paralegal was engaged in unauthorized practice.

6) Complaints against Franchise Paralegals

21 complaints have been filed against the Ontario Paralegal Ltd. franchise, 9 against Hyatt Paralegal, and 19 against Paralegal Associates.

7) Investigations and Prosecutions

The open files indicate that 31 cases are under active investigation, or have already been prosecuted, or have trials pending.

From January 1986 through March 1989, there were 26 prosecutions for unauthorized practice. There were 23 convictions on one or more counts, and one acquittal; two cases were withdrawn. In addition, 3 injunctions have been granted against paralegals.

8) The Pattern and Pace of Prosecutions

The number of prosecutions increased dramatically in 1988 and 1989; correspondingly, the number of independent paralegals increased dramatically around 1986.

The data indicate that a substantial number of the paralegals being prosecuted are associated with franchises or are more visible in some other way.

The data also suggest that while the Law Society has vigorously pursued some paralegals engaged in highly questionable activities, prosecution priority has not always been given to some of the most serious allegations of fraud and misrepresentation.

The evidence is not conclusive enough to determine that paralegal franchises have been singled out for harassment and prosecution since the Task Force was formed. The complaints in the files are disproportionately about paralegal franchisees. This may reflect a concerted vigilance on the part of lawyers or it may merely reflect the increased visibility of paralegals which then leads to complaints.

9) Discretion under the Unauthorized Practices Statute

The *Law Society Act* only provides that the Law Society shall be responsible for policing unauthorized practice. It does not specify what is meant by unauthorized practice, who should be prosecuted, or when.

The research discloses that while the Law Society uses its powers to investigate a range of activities which may offend the *Law Society Act*, it appears to be most vigorous in its investigation and prosecution of complaints against disbarred lawyers and paralegals. The 155 files on paralegals do not contain an answer as to why the Law Society's resources for investigation and prosecution are focused, apparently as a matter of priority, on paralegals.

10) Conclusion

While they do not wish to minimize the seriousness of the allegations or the documented problems posed by some paralegals, the researchers

believe that their search of the files provided to them by the Law Society provides no indication of a flood of complaints, particularly by the public.

The complaints appear to come mostly from lawyers, are mostly about potential unauthorized practice, and involve multiple complaints against the same paralegal or franchise. Only 22 files contain allegations of malfeasance. These cases do not appear to be the norm. In short, while the Law Society's concerns about potential problems may be real, on the evidence the public statements seem exaggerated.

X. SUMMARY OF FINDINGS

a) Over half the paralegals interviewed have been operating fewer than two years; only very exceptionally have paralegals operated longer than five years.

b) Paralegals engage in a range of activities including divorces, Small Claims Court litigation, wills, incorporations, debt counselling and debt collecting, landlord and tenant issues, rent review applications, workers' compensation applications, highway traffic offences, all other provincial offences, real estate matters, immigration issues, and applications for pardons for criminal offences.

c) A survey of Toronto households relating to the public's involvement in 1 or more legal activities such as the drafting of wills or articles of incorporation, and responding to a traffic citation, reveals that, of 606 such incidents, the professional services of paralegals were sought 2% of the time while the services of lawyers were sought 37% of the time.

d) Very few paralegals have any formal education or preparation to be a paralegal.

e) It appears that paralegals do not participate in continuing education in any formal, systematic way.

f) Over half the paralegals interviewed are incorporated and (with the exception of the POINTTS franchise) none carries professional liability insurance. The combination of incorporation and lack of liability insurance can have important implications for the possibility of redress by consumers for any negligent conduct on the part of paralegals.

g) Paralegals interviewed are overwhelmingly in favour of some sort of licensing or regulation.

h) Most paralegals appear to obtain the majority of their clients by word of mouth; very few clients come from referrals by lawyers; almost all paralegals engage in some form of advertising.

i) Most clients interviewed believe that paralegals are less expensive than lawyers and more responsive and attentive to their problems.

j) Clients of paralegals seem to understand clearly that the persons assisting them are not lawyers.

k) There is evidence that the fees charged by paralegals are less than those charged by lawyers.

l) Some people, constituting a segment of the population of undetermined size, use paralegals even though they would qualify for assistance through legal aid and legal clinics.

m) On the evidence, available delivery of paralegal services through the vehicle of a franchise appears to have no significant impact on such characteristics as speed, cost and quality.

n) There have been allegations, not well substantiated, that some franchisers sell franchises to individuals who are ill-equipped to operate them.

o) i) There have been some very serious, documented accounts of incompetence and misrepresentation on the part of some paralegals.

ii) However, consumers are generally satisfied with paralegal services.

iii) A survey of administrative tribunals indicates opinions that appearances before many tribunals should not be restricted to lawyers; however, paralegals should be required to undergo some training.

iv) Some Justices of the Peace and Provincial Prosecutors support a role for paralegals.

v) There is evidence that paralegals, in some situations, do not understand the appropriate boundaries of their competence.

p) i) The power of the Law Society to prosecute for unauthorized practice has been mostly focused on paralegals.

ii) The files of the Law Society indicate that there are a number of serious allegations of wrongdoing, some of which have been substantiated.

iii) However, the great majority of complaints about paralegals come mostly from lawyers, are mostly about unauthorized practice without any other allegations, and involve multiple complaints about the same individual or group.

UNAUTHORIZED LEGAL PRACTICE PROSECUTIONS AND INDEPENDENT PARALEGALS IN ONTARIO AND THE UNITED STATES

by John A. Flood and Frederick H. Zemans

I. THEORETICAL INTRODUCTION

The issue of unauthorized legal practice involves questions of professionalism and market protection. The legal profession, like other professions, is seen as being particularly successful at excluding others from its area of jurisdiction. Disputes over jurisdiction occur at the edges of this jurisdiction, specifically when certain conditions arise. These conditions are characterized by the "indetermination/technicality (I/T) ratio", where "I" represents the ideological underpinning of the profession and "T" represents the technical knowledge. "If either the knowledge base or the ideological underpinning deteriorates, the occupation will lose control over its spheres of activity....For an occupation or a profession to feel secure, it must maintain a firm knowledge base and imbue its novices with the necessary ideology."

The production process for professionals entails in reality two simultaneous processes, viz. production by producers and production of producers, the two being interrelated. And central to production are production and control...if a profession loses its grip over either of these processes it is accessible to invasion from other occupations.

II. LEGISLATIVE FRAME IN ONTARIO

Section 50 of the *Law Society Act* provides as follows:

(1) Except where otherwise provided by law, no person, other than a member whose rights and privileges are not suspended, shall act as a barrister or solicitor or hold himself out as or represent himself to be a barrister or solicitor or practise as a barrister or solicitor.

(2) Every person who contravenes any provision of sub-section (1) is guilty of an offence and on conviction is liable to a fine of not more than $1,000.

(3) Where a conviction has been made under subsection (2), the Society may apply to a judge of the Supreme Court by originating motion for an order enjoining the person convicted from practising as a barrister or solicitor, and the judge may make the order and it may be enforced in the same manner as any other order or judgment of the Supreme Court.

(4) Any person may apply to a judge of the Supreme Court for an order varying or discharging any order made under subsection (3).

The *Law Society Act* and the *Solicitors Act* are the statutory sources of the prohibition against unauthorized practice. Between 1891 and 1906, the Law Society made a series of attempts to convince the provincial legislature to grant the legal profession a monopoly over real estate conveyancing. The legislation proposed by the Benchers was intended to limit the negative

effect of competition from outside the profession by giving lawyers the exclusive right to offer advice to vendors and purchasers of real property. Benchers only obtained some degree of limited success in 1912.

The argument for a discrete and potentially monopolistic legal market was gradually expanded during the 1880's, with assertions that work by the "unqualified" was of poor quality, and thus a potential fraud upon an uninitiated unaware public. Lawyers also complained that, although lawyers were not permitted to do so, unlicensed conveyancers invariably advertised their services (including the low fees they charged), and generally combined their practice with activities such as the lending of money and the selling of insurance. The thrust of these arguments was that the public interest would be protected by allowing only lawyers to practise conveyancing. There is no comprehensive history of unauthorized legal practice in Canada. In Ontario, the Law Society began in the late 1880's to strengthen its licensing power to protect lawyers from external competition, and were somewhat successful by 1912. The chief arguments in support of self-governance by the Law Society were market monopoly and public protection.

1) Purpose of the Legislation

By 1940, unauthorized practice legislation was in place in Ontario. Twenty court decisions heard in Ontario from 1910 to 1988 relating to unauthorized legal practice demonstrate that the dominant feature is form preparation and advice. Real estate, matrimonial matters, wills and incorporations are all fields in which form completion is the principal service provided by lay assistants. Of the more recent decisions, these form completion activities constitute eighty per cent of the types of unauthorized practice of law.

2) The Judges and Unauthorized Legal Practice

The judicial interpretation of s.50 of the *Law Society Act* is that the legislation is intended to protect the general public of Ontario as well as to guarantee lawyers a monopoly over the practice of law. Recently judges have acknowledged the public service provided by paralegals, but the researchers remain skeptical about whether the main concern of judges is protection of the public or the economics of legal practice.

3) Acting or Practising as a Solicitor

There are two issues here: the type of actions which should be reserved for barristers and solicitors, and the frequency required to prohibit such activities. Canadian jurisprudence is unsophisticated in this area, and generally interprets "acting as a solicitor" as engaging in activity customarily undertaken by solicitors. American jurisprudence underlines the distinction between completion of documents and determination of legal effects or significance of facts. Similar analysis has been occasionally applied in Canada: *R.* v. *Nicholson*. In this case, the majority of the Alberta Court of Appeal concluded that Mr. Nicholson was not attempting to practise as a lawyer. The court analyzed closely the tasks performed by non-lawyers and applied American jurisprudence in finding for the non-lawyer. A minority opinion found that it was implicit in the manner in which Nicholson carried on his business and from his correspondence that Nicholson was practising as a solicitor. The lack of precision in determining what is "lawyers' work" is reflected in this division between members of the Alberta Court of Appeal, both with respect to their inability to agree on a definition of solicitors' work as well as the specific facts in issue.

"Acting" vs. "Practising"

Section 50 of the *Law Society Act* does not define "acting" or "practising as" a lawyer, and superficially there is little distinction between the issues raised by what is considered to be a solicitor's domain and what constitutes acting or practising as a solicitor. (Difficulty arises because the terms are used contradistinctively in the legislation). Canadian case law is not clear on whether there is any distinction between these terms. A reading of the unauthorized practice decisions since 1940 allows us to conclude that generally a requisite element required by the Ontario Courts to sustain a charge of unauthorized practice is that there has been a "frequent, customary or habitual" engagement in the activities in question.

The requirement of more than an individual or isolated event has been the approach taken in many decisions pursuant to section 50. The intent of section 50 is to prohibit actions which might endanger the public. If the legislature considers the type of matters dealt with by non-lawyers, it can be argued that citizens should be protected whether the service provided by the non-lawyer is isolated or habitual.

One interpretive suggestion is that the phrase "act as a solicitor" refers to the type of activities engaged in, while "practise as a solicitor" refers to the frequency of such activities: *R.* v. *Campbell and Upper Canada Business Administration Ltd.*

The research consultants recommend the removal of the term "acting" from s.50 of the *Law Society Act.* They prefer an approach requiring proof of habitual or ongoing unauthorized practice as well, because "acting as" adds little but confusion to s.50.

4) Holding Oneself Out to Be a Solicitor

Historically, liability for unauthorized practice as a non-member of the Law Society based on "holding out" or "representing" oneself to be a barrister or solicitor required proof beyond a reasonable doubt that the accused had represented himself/herself to the public as a solicitor.

More recent decisions have held it to be sufficient, for the purposes of s.50, that an individual held himself/herself out to be competent to perform services that require the skill and training of a solicitor.

III. THE LEGAL PROFESSION IN THE U.S.

The American Bar is essentially divided into two halves: corporate and individual. Most unauthorized practice complaints occur in the individual sector. For the solo practitioner, competition is stiff. To keep volume high, standardization is employed as much as possible. This reduces the I/T ratio. The corporate sector faces challenges primarily from the large accounting firms.

1) Unauthorized Legal Practice in the U.S.

No definition of authorized legal practise exists. Both the *American Bar Association Code of Professional Responsibility* and the *American Bar Association Model Rules of Professional Conduct* have abandoned any attempt at a systematic definition of a lawyer's practice and left the task to the State Courts. Currently 43 states have unauthorized practice of law (UPL) statutes in force. The result has been a chaotic fragmentation of interpretations of the unauthorized practice of law.

2) The Corporate Hemisphere

The existence of non-lawyers is sanctioned by the state, particularly in the corporate sector, for example, patent agents and accountants. The main argument in favour of these non-lawyers representing clients before federal agencies is that the subject matter is complex and the number of skilled persons is in short supply. As non-legal skills are required, lawyers have difficulty enforcing their monopoly; i.e. the knowledge base has been incorporated by a competing profession, and T in I/T has declined, leaving the boundary of the profession permeable. Further, corporate lawyers depend on repeat player clients whereas solo practitioners deal with one-shot clients who, because of their inexperience in the law, are much more dependent on lawyers.

3) The Individual Hemisphere

Real estate, wills and marital law lend themselves to standardization. Thus, the I/T ratio declines and boundary disputes occur. This is confirmed by the statistics on the number of successful UPL challenges.

a) The Self-Help/DIY Legal Literature

HALT and Nolo Press have been successful in the publication of Do It Yourself legal manuals. Some state Bars have been antagonistic to self-help legal materials, while others have been less so. Self-help computer software programs are also available. As yet, these have not been proscribed by any state court, but, given the general state of the law on DIY literature, UPL allegations and injunctions on self-help software are bound to be unevenly distributed.

b) Third Party Non-Lawyer Advisers

The law on paralegals is erratic and inconsistent. Florida is the most aggressive state in prosecuting UPL, particularly in holding oneself out as an attorney. The most useful way to analyze the data is to break them down as follows:

i) UPL Involving Cognate Occupations, e.g. Realtors, Bankers

Without doubt, the filling of real estate forms is one of the most contentious areas in the UPL battle. The successful challenges only slightly outnumber the unsuccessful. Recent developments suggest that non-lawyers will continue to encroach as long as protection for the client—being advised to consult an attorney—is given.

ii) Pretending to be an Attorney

In civil law countries, the profession of notary is highly esteemed. This leads to confusion in the U.S. where there are no formal qualifications required for certification of notaries. While there have been complaints about notaries, only in Chicago have there been investigations.

iii) Paralegal Services

State bars and the courts have acted consistently in attacking paralegal service companies. Despite this, paralegal services are growing. In Pennsylvania, a paralegal service for low-paid people has been judicially approved. In Texas, paralegal services for lawyers are operating. In California, non-lawyer "legal technicians" are going to be licensed and will be subject to civil and criminal penalties if they violate the provisions of the state Bar's Public Protection Committee.

iv) Goal-driven groups

Non-lawyers are being permitted to represent others in hearings, in spite of the fact that attorneys like to regard judicial and non-judicial forums as their bailiwicks.

IV. CONCLUSION

In both Canada and the United States, courts are allowing greater access to legal services via non-lawyers. This is especially true in the corporate sector. In the areas particularly amenable to standardization, there are challenges and these will continue.

V. APPENDICES

1) British Columbia

The B.C. *Legal Profession Act*, which recently superseded the *Barristers and Solicitors Act*, provides the legislative guidelines for determining who can and cannot perform functions traditionally considered the lawyer's domain.

Section 1 of the *Legal Profession Act* outlines the elements included within the definition of the "practice of law".

Section 3 establishes that the legislation is to operate so as to promote the public interest.

In spite of, or perhaps because of, the restrictive terms of the *Barristers and Solicitors Act* and the Law Society's efforts to monopolize a variety of

services which may not necessarily need a lawyer's expertise, there have been virtually no cases in which the Law Society of British Columbia has brought an action against an individual or group of individuals for providing legal services on a one time or regular basis. This is likely due to the unequivocal wording of s.77 and the court's reluctance, in B.C., to allow non-lawyers to provide any of the services mentioned in the Act unless they fall within the exceptions of the *Court Agent Act.* Consequently, almost all trained paralegals have decided to work under the supervision of a lawyer, because of the specificity of the B.C. legislation.

The two POINTTS cases, *Law Society of B.C.* v. *Lawrie* (1988), and the legislation in B.C. create a highly restrictive framework. This allows for the regulation of persons involved in the provision of legal services in an attempt to ensure that such individuals are engaging in the authorized practice of law.

2) Quebec

The relevant legislative provisions pertaining to the unauthorized practice of law in Quebec are contained in the *Bar Act,* otherwise known as *An Act Respecting the Barreau du Québec.* These provisions are to be read in conjunction with the *Professional Code,* which establishes the regulations by which certain professions in Quebec are to operate.

The operation of the *Code* creates a unique situation by providing a provincial regulatory scheme for professions. The *Code* establishes a regulatory body, the "Office des Professions du Québec", charged specifically with the monitoring of certain professions. The *Code* serves as a general regulatory scheme that supplements but also takes precedence over specific acts designed to regulate individual professions.

The regulated professions are specified in Schedule 1 of the *Code* which includes the legal profession — "The Corporation Professionelle des Avocats du Québec". Quebec has divided its legal work into two specific professions through the additional operation of notaries — "The Corporation Professionelle des Notaires du Québec". The *Notarial Act* is also subject to governance by the *Code*. This distinction between the legal profession and notaries demarcates and establishes the parameters of the practice of each particular profession.

The professions represented in Schedule 1 of the *Code* are referred to as professional corporations whose principal function is to supervise the practice of the profession by its members so as to ensure the "protection of the public".

Subsection 128(1) of the *Bar Act* outlines specific acts the performance of which are the exclusive prerogative of the advocate or solicitor. Subsection 128(2) distinguishes between those acts reserved for the advocate to the exclusion of the solicitor.

Section 133 establishes the types of activities that if performed by a person other than a member of the Bar constitute the practice of the profession illegally. Section 134 expands on this notion of illegal practice.

The penalties for offences pursuant to the Act are outlined in section 188 of the *Professional Code*.

POTENTIAL REGULATORY MECHANISMS FOR INDEPENDENT PARALEGALS

by Eileen Gillese

Paralegalism has grown significantly because other non-traditional, alternative modes of legal service have failed to address all of society's legal needs. These non-traditional legal services include legal clinics (student and community), welfare action centres, tenant hot-lines, lawyer referral systems, native court workers, prepaid legal services, and public interest advocates. With the increased demand for legal services, there has been an increased demand for paralegals. Many people argue that lawyers' fees are high, especially for services which a person of a lower level of skill or training could perform. Therefore, a case can be made for the existence of paralegals so long as mechanisms are put into place to deal with any problems they may create.

I. ADVANTAGES AND DISADVANTAGES OF PARALEGALISM

The advantages of paralegalism include the following:

- it creates a spectrum of legal advice givers;
- it expands consumer access to legal services and the legal system;
- it fills gaps in the services currently provided in the legal community;

- it makes possible the provision of routine matterS at low cost to the consumer.

Currently, paralegals are given legitimation by the *Statutory Powers and Procedures Act* which allows representation by agents before administrative tribunals; by the judiciary as a result of the POINTTS case; and by the *Provincial Offences Act*, authorizing a defendant to appear by agent.

The actual or potential disadvantages of paralegalism are:

- the public is not presently protected from harm that could occur when someone other than a lawyer offers legal services;
- the paralegal may not be competent to recognize or deal with any implications arising from matters outside the paralegal's area of specialty;
- the absence of supervision or disciplinary procedures;
- the paucity of professional/ethical standards;
- the lack of control over trust funds;
- the lack of liability insurance or a compensation fund.

II. NON-REGULATORY OPTIONS

1) Retention of the status quo

One option is to maintain the status quo, allowing market forces to eliminate fraudulent and incompetent paralegals from the marketplace.

The advantages of this option are:

- it is less costly than a regulatory regime;
- it provides for paralegal activity in areas currently recognized as lawful by the Ontario Court of Appeal in POINTTS;
- it requires no outlay of governmental funds.

The disadvantages are that

- some individuals will get hurt until market forces actually eliminate fraudulence and incompetence;
- the L.S.U.C. opposes the status quo; and
- maintenance of the status quo does nothing to promote the growth of paralegal services because it eliminates any paralegal services beyond those sanctioned in the POINTTS case.

2) Modification of the status quo

The L.S.U.C.'s most recent submission is that paralegals be allowed to practise only before those tribunals which have granted permission and that regulation as to competence and quality be done by tribunals and courts themselves. Modification of the status quo in the manner proposed by the L.S.U.C. may result in the following disadvantages:

- more restrictions will be placed on access to non-lawyers;
- there may be inconsistencies among tribunals as to what constitutes an acceptable standard of competence;

- tribunals are not necessarily experienced or skilled in discharging this type of responsibility.

3) Deregulation

A third option would involve the relaxation or deregulation of the unauthorized practice provisions so that only certain activities remain unauthorized.

The advantages of this option include the following:

- it involves no cost to the state;
- it enhances the spectrum of availability of legal services;
- it lowers barriers to entry to the legal services market, thereby increasing competition;
- it may lead to a better product offered by lawyers; and
- it may also promote more readily available and less expensive legal services.

The disadvantage of deregulation is the possibility that deregulation will cause the existing problems associated with paralegalism to escalate.

III. THE CASE FOR REGULATION

Third party and societal costs suggest the need for regulation, without which members of the public, such as children affected by family law matters, will be vulnerable. Regulation will also enhance the status of

paralegals, enabling them to promote their services without fear of prosecution. Thus, regulation will promote the development of paralegal roles and functions but will also protect the public.

On the other hand, an argument against regulation is that it is premature to regulate at this point because the functions of paralegals are only just developing. Therefore, to regulate would be to freeze paralegals' current roles and functions by stifling further development.

IV. REGULATORY OPTIONS

1) Registration

The possible advantages of a registration system are:

- it aids in the location and prosecution of fraudulent paralegals;
- it may encourage greater educational and self-certification efforts;
- the costs of such a system are low;
- it can be quickly implemented; and
- it retains flexibility in terms of paralegal activity.

The disadvantages of registration include:

- the public may perceive a registration system as in fact certification and thus believe that all those who have registered have met certain standards of competence;

- registration provides no assurance of competence;
- registration provides for no supervision or disciplinary procedures; and
- registration does not meet risks posed to third parties or society.

2) Certification

Such a process must be based on competency requirements through a series of exams. Certification would also help to delineate those activities deemed to be legitimate, thereby assisting in defining paralegalism. Furthermore, the certifying agency could require a certain amount of upgrading which would also help in the protection of the public.

The advantages of certification are:

- it enhances the activities of paralegals by eliminating the fear of prosecution;
- it would assure a certain level of competency and qualification; and
- the threat of loss of certification may have a positive impact on the maintenance and enhancement of standards.

The disadvantages are that certification:

- offers no mechanism for ongoing supervision and/or discipline;
- would not provide a compensation fund to deal with fraudulent behaviour;

- may preclude certification of some groups;
- fails to eliminate third party or societal costs; and
- may discourage innovation due to the rigidity of such a system.

3) Licensure

A licensing system would require the legislature to define areas and services which a paralegal can or cannot perform, thereby creating exclusive jurisdiction to licensees because license is a mandatory prerequisite to the offering of legal services.

The advantages of a licensing system are that

- it would protect the public by means of exclusion;
- it appears to be the clearest way to protect a vulnerable public from identified risks because it establishes rigorous and uniform standards for all paralegals; and
- it is the only form of regulation which diminishes third party risks.

The disadvantages of licensing are:

- it may restrict the number of practitioners, thereby decreasing competition by increasing the barriers to entry;
- it may make the definition of appropriate standards for the large number of paralegal activities difficult, thus increasing the cost of services;

- it may encourage the development of a parallel elite to the legal profession.

V. REGULATORY AUTHORITIES

The regulatory authorities should include members of the legal profession, the judiciary, the public and paralegals.

1) The L.S.U.C.

- could act as the regulatory agency or as an interim body until a self-regulatory body can be established;

- has the existing structures, resources, expertise, and experience; and

- would be able to provide consistency and uniformity of standards and ethics. Moreover, the L.S.U.C. could carry out its regulatory function without any increased cost to the state. However, the L.S.U.C. itself opposes this role and paralegals per se. Its regulation of paralegals might also be seen as a conflict of interest.

2) Self-regulatory Body

Such a body would have to ensure adequate representation of the lay public as well as adequate expertise. It could be autonomous or subject to an overriding authority.

3) Government Regulation

Regulation of paralegals by government would probably result in a trade-off between the costs to implement and administer a paralegal scheme and the costs of current programs such as legal aid clinics.

This form of regulation could be in coordination with the Ministry of Consumer and Corporate Affairs or a regulatory board, council, commission or the establishment of a superintendent.

REPORT ON THE EDUCATION AND TRAINING OF INDEPENDENTLY PRACTISING PARALEGALS

by Neil Gold

I. DESIGNING AN EDUCATIONAL PROGRAM FOR INDEPENDENT PARALEGALS

Although there has been increasing interest in the training of paralegals, most is focused on supervised paralegals. This paper will discuss programs to prepare paralegals to practise independently. To date, paralegal education has been for supervised paralegalism, and is aimed at particular job descriptions. It is offered by paralegal providers themselves, on-the-job, or through the community college system. It includes lectures, and practical experiences, but there is no standardization. While paralegal practice may lack the subtlety, complexity and indeterminacy of a professional practice, paralegals must be taught the limits of justifiable representation.

Before it is possible to design an education program for independent paralegals, there must be:

- clear definitions of the occupational activities of independent paralegals;
- performance levels established based on consumer expectation, ideals, economies, and efficiencies; (Instructional design technology can help to determine these standards)
- entry levels established.

II. ESTABLISHING PERFORMANCE OBJECTIVES

Performance standards will be a function of client needs and expectations, and the minimum expectations of society. To develop these standards, the following tasks must be completed:

1) *Occupational Analysis:* All possible tasks required of the paralegal must be catalogued and rated according to their frequency, importance and difficulty. Only then can performance levels be specified. From this catalogue, it can be determined what specific knowledge, skills and attitudes are required.

2) *Task Analysis:* Each task must be broken into its constituent elements; this information will be helpful in the course authoring process.

3) *Capabilities Assessment:* Each task must be analyzed to determine the knowledge and skills required to accomplish it. The ultimate skill is knowing one's own limits. This combined with the ability to stay in one's own limits is the definition of competence.

Once these skills are analyzed, they must be arranged in a hierarchy to establish the order in which instruction should be given.

High quality service requires honesty, integrity, diligence and perseverance. These and any other attitudes required must be identified. While it may be difficult to teach attitudes, they must be communicated and demonstrated.

The major difficulty in establishing performance objectives is specifying the degree of accuracy, completeness or rate of success required in each task.

These objectives may depend on the conditions and standards in a particular situation. Thus, objectives can only be established when required skills, conditions and standards have all been defined.

This paper does not attempt to identify the level of knowledge required for paralegal practice. "It is the combination of skill applied to knowledge, with the appropriate attitude, which gives rise to definably acceptable...paralegal service."

III. A TWO-YEAR PROGRAM PROPOSED

Based on assumptions about the output of the design analysis, this paper proposes a two-year program for independent paralegals with a common Year I core program based upon the following subject matter:

1) *The Legal System:* To introduce students to the nature of law, its principles, its institutions, and some basic jurisprudential issues. Topics include the sources of law; common law; legal institutions; role of judges, lawyers, and paralegals; doctrines of precedent and *stare decisis*; natural justice.

2) *Basic Legal Method:* Legal research and problem solving.

3) *Practice Management:* The operation of a paralegal office. Topics include file management, office procedure, accounting, dictation skills.

4) *Interviewing and Negotiating:* The skills of interpersonal communication, interviewing, and conflict resolution.

5) *Writing and Drafting:* The rules relating to the organization and structuring of legal documents.

6) *Paralegal Ethics:* To convey to the students the importance of honesty, integrity, and professionalism and the rules of conduct which apply.

Year II of the program would provide for the streaming of students into particular skills courses and programs.

Either

a) Representation of clients before courts and other tribunals.

Advanced negotiation in the context of litigation.

Courtroom practice and etiquette.

Fact investigation.

Advocacy.

Or

b) Office specialty streams.

Advanced writing and drafting.

Computer skills.

Year II - Specialty Streams in order of Specialization

I: Paralegal Specialty Subjects

Conveyancing

Wills and Probate

Landlord/Tenant

Highway Traffic , Etc.

A list of program design criteria are set out in this paper at pages 37 and 38.

How well students having successfully completed such a program will perform in everyday practice is the ultimate assessment of a training program. Therefore, teaching should incorporate as many lifelike examples as possible. Because a program developed according to the guidelines set out in this paper will have performance levels, standards, and conditions already established, "marking outlines" will be ready-made for assessment procedures. Criterion-referenced, systematically applied, as true-to-real-life-as-possible assessment procedures are likely to be more effective than traditional exams or essay assignments.

At this point, lesson plans can be devised. By identifying learning outcomes and assessment procedures first, instruction is almost assured to achieve the learning objectives prescribed. No information should be memorized that can be checked and verified in practice. By learning in school how to resolve problems, graduates are more likely to be capable of learning on the job. Since people learn differently, a variety of methods should be employed.

Students should be assumed to be high school graduates, with differing levels of preparation. Lessons must accommodate this disparateness while maintaining relevance and meaningfulness.

Experts from all fields with an interest in the training and education of paralegals should have input. The vocational orientation of the community college system in Ontario makes it a suitable place for the education and training of paralegals.

A total competency maintenance and enhancement program must be established to include regular re-certification procedures, mandatory attendance at continuing education sessions, or spot practice audits.

Development of the one-year core program would require 3 full-time people with clerical and support staff for one full year at a cost of about $250,000.00. Paralegal specialty streams would require 1.5 persons for 1 year and cost about $125,000.00.

CONSTITUTIONAL ASPECTS OF ACCESS TO LAW

by Noel Lyon

I. GENERAL ANALYSIS

Before 1982 and the *Charter,* constitutional issues were essentially focused on the division of powers. However, while it was clear that activities under the practice of law were under provincial regulation, society had become so regulated, that legal services were no longer synonymous with the court system. Thus even before 1982, the constitutional question of regulation of legal services was unclear.

> *The Charter is a...statement of values that transcend the mechanics of federalism.*
>
> *The Charter's recital of the rule of law as a fundamental value of Canadian society...makes access to law an incident of citizenship, like freedom of conscience or of speech, leading to its characterization in constitutional terms as a matter of fundamental justice.*

Access to law, as an expression of fundamental justice, may make us look at the division of powers in a new light. Why are we focusing on paralegals and their regulation when the actual issue is a question of fundamental justice, specified as the right of a citizen to have access to law? All citizens have the right to represent themselves, but in reality most require assistance to do so. We should not assume that the only answer to this dilemma is regulated paralegals. There are alternatives:

1. Provide for access to the law as an integral part of the law;

2. Simplify access where complexity is avoidable as in, for example, the Small Claims procedure in Quebec;

3. Establish public interest organizations to provide legal services to collectives;

4. Promote access to law by giving citizens the necessary information to pursue their own rights and obligations: s.36 may be construed such that this is a constitutional obligation.

The constitutional value in access to law is a broad issue, and provincial regulation of paralegals seems a likely response. The regulating regime must be developed in awareness of this larger context.

II. THE CHARTER'S IMPACT

The Charter gives access to law both a new meaning and a new importance by committing to the ultimate protection of the courts the fundamental values of a free and democratic society.

So far, Supreme Court of Canada Charter decisions are aimed at the legal profession. Thus, access to Charter law so far is largely through specialists. But the *Charter* itself consciously puts people at the centre. Therefore, access to law can be claimed as an essential public service which all governments are committed to providing by s.36.

III. PARTICULAR CHARTER PROVISIONS

The reference to fundamental justice in s.7 is the heart of the *Charter*.

> *Fundamental justice requires that citizens have reasonable access to law in a society that adheres to the rule of law.*

Governments will then be inclined to simplify procedures, and other advisors and representatives will develop. Paralegals may be only one of several such groups. Once we reject the professional monopoly of access to law as an unjustifiable limit on liberty, access to law will become an integral feature of laws. On closer examination, paralegals may be seen to serve the needs of the profession more than those of the public.

> *...access to law, not the practice of law, is the relevant constitutional value.*

Freedom of expression, s.2(b), may assert the individual's right to exercise rights, and lawyers may use s.2(b) to challenge any attempts to limit their right to represent or advise.

Mobility rights, s.6, are not yet well defined, but the current limits on interprovincial access will have to be justified as the least intrusive way to secure public interests.

The principle of equality, s.15, will have to be evaluated against the diversity now tolerated in the name of federalism. The supremacy clause and the *Charter* require that we rethink our constitutional theory. The courts can do some things, but governments have the flexibility and resources to translate the *Charter* into reality much more quickly than the judicial system.

The equality principle becomes part of the new vision of Canada and emphasizes the unifying value of federalism and some subordination of diversity. This is a difficult problem for access to law since the courts are seen as the system of access and they are generally provincial. But s.92(14) uses the phrase "in the province" and this is still open to interpretation.

> *Equality in access to law is a matter of fundamental right on any whole view of the Charter...[T]he question becomes one of how far equality is either served by or can accommodate to federal diversity.*

Access to law thus involves wider questions than paralegals and their regulation. Rather than attempting to provide access through the existing structure, we should be looking for ways to provide the optimum level of citizen access to the law.

IV. THE UNITED STATES' EXPERIENCE

In the U.S., the major issues in relation to paralegals are due process and free speech. Access to law is defined by unauthorized practice prohibitions, which are policed by the judiciary, and sanctioned by the contempt power. The question is whether or not these unauthorized practice prohibitions violate due process or freedom of expression.

The due process concerns relate to the vagueness of unauthorized practice definitions. These concerns would probably gather around s.7 of the *Charter*. In addition, s.1 requires that the limitations be prescribed by law. Moreover, an interest in the outcome combined with a monopoly might

cause the Supreme Court of Canada to apply the bias principle from administrative law.

Freedom of expression and association in the U.S. resulted in a powerful constitutional protection of citizens against the excesses of unauthorized practice. This extended only to lay representation and access to judicial processes.

To summarize the U.S. insights:

- In the U.S. the judiciary decides who appears before them. This may lead naturally to legislatures conferring a similar power on administrative tribunals.

- Enforcement of unauthorized practice prohibitions by the Bar raises questions of fundamental justice since the Bar has a monopoly on the practice.

- Public interest advocacy that involves collective action to secure legal rights is an exercise of freedom of expression and association.

Deborah Rhode's article provides a good perspective on the constitutional position in the U.S.:

> *The U.S. recognizes the right to sue and defend as basic. The right to self-representation is embedded in the due process doctrine. It has a first amendment dimension as well because of its expressive, educational and political significance as well*

as its potential for self-realization. Unless there are compelling state interests, people should not be denied lay assistance. Enforcement of unauthorized practice prohibitions have always proclaimed consumer protection, but have never proved it. There are additional considerations: increased lay competition may reduce prices, and some obstacles to reform may be removed.

V. FEDERAL JURISDICTION ISSUES

The important constitutional issue is whether access to law has the status of a guaranteed right under the *Charter*. If so, then the federal principle must be applied. Since 1982, fundamental rights and freedoms are being seen increasingly as inherently national in character. We need to know which level of government may do what to secure the access to law (not merely access to courts and representation) as guaranteed by the *Charter*.

Access should be seen as an inherent feature of law in a society founded on the rule of law. Courts and lawyers provide just some of the means of access.

The topic of this paper is "constitutional effects of regulating independent paralegals". There would probably be no noticeable effects. The provinces already regulate most vocations, and the federal government would likely continue to defer to this provincial assertion of exclusive competence. Charter challenges would not be promising once access to law is reaffirmed as simply delivery of legal services. The terms of reference of this Task Force suggest that the dominant way of thinking is already cast in

terms of delivery of services, with the legal profession and its regulation providing the model.

> *The really important effect of regulating paralegals as the sole response to the larger problem of access to law would be a missed opportunity to re-define the rule of law in a way that makes the measure of fundamental justice the actual degree to which rights and freedoms are secured and promoted rather than the fine words we can point to in the Constitution and its judicial interpretation....The Charter offers us a different vision of the rule of law, one that calls for some freeing of citizens from the rule of lawyers.*

VI. WAYS OF THINKING

This Task Force should establish the idea of an essential unity between legal rights and the access to the means to secure them. We seem to accept the idea of rights granted by a Constitution and access governed by the marketplace. If a right cannot be exercised, it does not exist.

INSURANCE FOR PARALEGALS IN ONTARIO

by Julio Menezes

I. PREFACE

While compulsory universal errors and omissions insurance would be a valuable adjunct to the regulation of paralegals, it is not currently an available regulatory option. There is no reason to believe that the insurance industry would make available coverage for a sufficiently large proportion of paralegals.

For the purpose of regulation and insurance it will be necessary to distinguish between paralegals, and establish distinct sub-groups. For example, paralegals acting in the field of real estate ought to be compelled to have adequate fidelity and liability insurance.

Compulsory insurance may result in a significant barrier to individuals wishing to become paralegals.

Paralegals working in searches or registrations related to the creation or transfer of interests in personal property would not necessarily have to have fidelity insurance and the policy limit on compulsory errors and omissions insurance could be set at a considerably lower amount than for those dealing in real estate.

Why should the status quo of the client bearing the risk be maintained?

1. Apart from modest retainers, no "property or personal injury" is at risk in the transactions between clients and paralegals.

2. The consequences of incompetence such as delay and anxiety cannot be insured.

3. The availability of insurance is very limited.

4. Claims settlements are expensive.

(According to the Empirical Profile undertaken by Professors Bogart and Vidmar, the bulk of paralegals would be classified in the status quo sub-group.)

Recommendations:

1. Avoid using the complex and overburdened role of the Law Society of Upper Canada as a regulatory mode.

2. Emphasize in the report of this Task Force that the role of any official or agency protecting the consumer should not be compromised by the format of insurance coverage.

II. INTRODUCTION

This paper is based on the assumption that independent paralegals will be permitted to operate in Ontario within statutory limits that will include the range of activities they are currently practising. The issue, then, is whether or not paralegals should be required to have insurance coverage.

At Issue: Whether Paralegals should be required to have insurance coverage.

Four classes of insurance were considered:

1. Errors and Omissions: coverage for a professional against liability to third parties arising from sub-standard performance;

2. Fidelity: indemnity against fraud and embezzlement;

3. Surety: coverage for the risk of non-performance by a contractor;

4. Title: coverage for the deficiencies in title to interests in land.

Paralegals organized as businesses could use other forms of insurance such as:

- occupier liability insurance.
- business interruption insurance.

III. INSURANCE BASICS

There are two models of indemnity insurance:

1. The intermediary (either a corporate insurer or risk pool administrator) calculates the aggregate losses likely to be incurred from a defined risk over a particular term. The intermediary charges a premium to each of the persons at risk that reflects the aggregate loss, marketing, adjusting (loss settlement) costs and some profit if appropriate.

If paralegals are insured under this model we must consider:

a) the question of numbers;

b) the issue of specific risk.

Anyone can describe herself/himself as a paralegal, but no such profession exists known to law. Thus, it makes it difficult to determine the third party liability of a self-proclaimed paralegal.

2. Insurance may also take the form of gambling.

Someone with a large pool of money puts some of that money at risk by offering odds against the occurrence of a contingent event.

Until a newly created self-governing body has been in existence a few years, there will not be a sufficient number of paralegals to establish a viable insurance pool.

Also, if a demand is created for liability insurance by mandatory participation, supply will not necessarily expand to match, as, for example, in the failure of the Canadian Insurance Exchange to attract any underwriting syndicates.

IV. ARGUMENTS IN FAVOUR OF INSURANCE

Insurance regulation will enhance the impact of the regulation of paralegals. It may encourage growth in the numbers in this field.

If controlled and limited growth is the goal of regulation, insurance can be used to force existing practitioners out and to create a high entry barrier for the future.

The benefits of compulsory insurance have to be weighed against its availability, price, cost and complexity of claims settlement and the possibility that the protection provided may be less than the lay public may assume they are receiving.

1) *Marketing*: The public will be more inclined to use paralegals if they are certain that they are sheltered from the risk of fraud and incompetence.

2) *Fair Competition:* It is unfair to burden one group of competitors with compulsory insurance if another is exempt.

3) *Protecting the Taxpayer:* Insurance is an alternative to over-intrusive, direct government intervention.

V. TYPES OF INSURANCE

1) Liability Insurance

This is likely to be the most significant class of insurance in the regulation of paralegals.

This type of insurance is insurance against liability arising out of: a) bodily injury to or death of a person, including an employee, or b) the loss of or damage to property. It also includes insurance against expenses arising out of bodily injury to a person other than the insured or a member of his family, whether liability exists or not, if the insurance is included in a contract for insurance but does not include aircraft insurance or automobile insurance (R.R.O. 1980 Reg. 529, s.2(9)).

A subcategory of this area is *Professional Liability or Errors and Omissions Insurance.* The insured professional is given the initial protection that in the event of being sued by a client the insurer will defend the action on the insured's behalf. Protection of the client/plaintiff is indirect because if the claim is contested the plaintiff must first be successful in obtaining a judgment.

As a judgment creditor the plaintiff can make a claim on the policy of the defendant. The insurer is entitled to raise any defence against the judgment creditor that it has against the insured. Therefore, if the insured has breached the terms of the policy the innocent victim will not be in any better position.

2) Fidelity Insurance

A very small fraction of paralegals in Ontario have this type of coverage. Fidelity insurance may take either of two forms:

a) insurance against loss caused by unfaithful performance of duties by a person in a position of trust; or

b) insurance whereby an insurer undertakes to guarantee the proper fulfilment of the duties of an office (R.R.O. 1980 Reg. 529, s.2(6)).

It is alleged that the extension of the right to engage in the unauthorized practice of law is in fact subjecting the public to a greater risk of fraud.

Fidelity insurance policies, though written quite restrictively and interpreted accordingly, can act in the broad coverage fashion of errors and

omissions insurance because negligence can be covered. Fidelity insurance is cheaper and more readily available because negligence is generally not a peril covered by such policies. Negligence is more likely to occur than "bad faith". It is also easier to prove in a civil suit.

3) Surety Insurance

This is a contract by which an insurer undertakes to guarantee:

a) the due performance of a contract or undertaking; or

b) the payment of a penalty or indemnity for any default (R.R.O. Reg. 529, 1980, s.2(141).

While it appears that surety insurance has some potential because the examination of complaints laid against paralegals indicated that non-performance was a significant category of complaint, it is unlikely that any product will be tailored by the insurers in this class to cover paralegals. The realities of the marketplace make this highly improbable. Activity in this field is largely concentrated on insuring against the risk of bankruptcy for major construction contracts.

4) Title Insurance

Title insurance is restricted to guaranteeing title to land (R.R.O. 1980, Reg. 529, s.2(15)).

It is first party insurance guaranteeing to indemnify the interest holder, and a type of insurance restricted by regulation to a solicitor. The probable purpose of this regulation is the protection of the lawyer's monopoly on real

estate transactions against competition from U.S. title insurers. This restrictive regulation could be eliminated without any serious threat to any insurance regulatory purpose or modified to include paralegals with solicitors.

VI. THE PROFILE OF PARALEGAL PRACTICE IN ONTARIO

Professor Menezes refers here to the study by Professors Bogart and Vidmar, entitled "An Empirical Profile of Independent Paralegals in Ontario".

Except for regulation 529 s.3(3), there are no legal reasons why members of the public who engage the services of paralegals cannot be fully covered by insurance against potential losses.

From the Bogart and Vidmar study, it is sufficiently clear that insurance coverage for paralegals is being written in a "boutique" fashion, tailored to the particular insured. Even after the implementation of regulation, "packaged" policies geared to the profession as a whole will take a while to emerge. According to this study, the total number of paralegals who are operating with benefit of errors and omissions insurance is minuscule. Thus if the requirement for errors and omissions is made compulsory, there are insurers who are willing to write this type of coverage for paralegals, but in the early stages such a requirement would virtually wipe out paralegals in Ontario.

From the perspective of insurers, paralegals are not so much a bad risk as a risk difficult to assess. The majority are very recent entrants into the field, so it is difficult to develop a composite track record. To overcome uncertainties, a prudent insurer would insure the worst and thus charge high premiums.

1) Paralegal Perspectives

a) Responses to Why Insurance Was Not Needed

Professor Menezes felt that the interviewers in this study were seeking a fairly substantial amount of information in a single interview and therefore the responses could not be probed in great detail. Therefore it is possible that the reasons for this particular response varied in some considerable degree in terms of the validity on which they were founded.

Some respondents felt that incorporation itself provides an impregnable shield. Case law rules against this presumption: see *Ataya* v. *Mutual of Omaha Ins. Co.*, [1988] I.L.R. 1-2316. In this case, the proprietor of an incorporated insurance agency was held personally liable with the corporation for negligence.

Others based their responses on the basis of their own competence or the fact that they had not received any complaints.

Paralegals involved in "form-filling" functions felt that under these circumstances they did not need insurance since it was improbable that a paralegal would be sued for less than due diligence in causing a delay.

b) Cannot Get Insurance

It is not surprising that some paralegals have not been able to get insurance. The insurance broker for POINTTS Ltd. confirmed that this is very hard insurance to obtain.

c) Too Expensive

Compulsory insurance will inhibit entry into the field. The insurance rates now paid by some paralegals compares well with the best rates paid by members of the Ontario Bar. But some respondents to the Bogart and Vidmar survey were clearly under-capitalized and operating in circumstances where they had a very limited ability to pass on additional costs to their clients.

Regulation could have a positive impact on the costs and availability of insurance. The current costs of insurance are a by-product of the novelty of paralegals.

The Report of the Task Force alone will allow potential insurance suppliers to the paralegal profession to target their market without excessive marketing costs.

2) Regulation and Recognition

a) Brokers or agents have never heard of such insurance.

b) Such insurance is only available to lawyers.

c) Paralegals are unregulated and lack uniformity. Therefore, insurance is routinely denied them. The label "paralegal" is, from a risk assessment standpoint, almost totally without content. Yet a paralegal engaging in a real estate transaction is subject to virtually the same risk as real estate lawyers.

The homogenization of the profession within the general category of paralegals will make it much easier for insurers to re-examine the question of providing coverage. In time broad categories of paralegals will emerge.

3) Group Coverage

The only way in which a voluntary association would improve its members' abilities to obtain insurance is, as discussed above, through the homogenization of sub-disciplines within the general field of paralegals. By setting membership standards, the association would in fact be rendering it easier for insurance companies to evaluate the risk.

4) Analogy to the Law Society

a) The Law Society has a direct statutory obligation to the public and hence would have no difficulty in claiming to have an insurable interest.

Professor Menezes feels it would be stretching the concept of insurable interest as now defined by the Supreme Court of Canada in *Constitution Ins. of Canada* v. *Kosmopoulos*, [1987] 1 S.C.R. 2, in a manner that would include a voluntary association of paralegals no matter how narrowly the membership of that association is defined.

b) The Law Society has the money to enable it to operate in part as insurers.

c) Mandatory membership of several thousand lawyers with a cumulative earning capacity of millions of dollars means that only increase in the number of claims can be covered by increasing insurance levies.

Therefore, a voluntary group would have greater difficulty in obtaining insurance.

VII. RECOMMENDATIONS

Classes of Paralegals

The Task Force must define "paralegals". Insurers do not want this task. If insurance is to be a part of a regulatory system, some coherence must be imposed on the current diverse nature of the field of paralegals.

Therefore, paralegals for insurance purposes should be divided into three broad categories:

1) Group A

Real Estate Conveyances

(Errors and Omissions Insurance and/or Fidelity Insurance)

- the minimum policy limit per claim can be set below the current Law Society level.

- title insurance will not work because it covers the title holder and to require that a paralegal make sure that his/her client has this coverage creates an immediate conflict of interest. It is also expensive even though it provides considerably better protection for the consumer.

2) Group B

Personal Property

(Errors and Omissions Insurance)

- most of the paralegal activity relating to personal property matters is of a routine nature.

- like Group A, the potential catastrophic risk is substantial; thus, insurance should be required.

- there should be a per claim limit of $50,000.00 and an equal restriction on the right to practice.

- the drafting of simple wills should be included in Group C rather than in this group unless the claims experience of the Law Society of Upper Canada justifies the contrary.

3) Group C

Other

No Compulsory Insurance

The public has already demonstrated a willingness to engage in risk taking.

For most of the activities in this category it is highly improbable that liability as it is now recognized by law would in fact be easily established. Insurance under these circumstances is pointless.

In all of these activities the potential risk has a maximum limit that is in fact a fairly modest one. Establishing an across-the-board barrier to entry into a field engaged in routine specialized activities of relatively insignificant dollar value cannot be justified on the basis of the one in a million possibility.

Direct regulation of admittance via character screening and registration fees is a better method than compulsory insurance for this group.

Paralegals in Classes B and C might be required to carry fidelity insurance. It is readily available and not too expensive but does not provide substantial protection because it covers only fraud and bad faith on the basis of the frauds alleged to have been committed in the past. Coverage of $5,000.00 is sufficient.

VIII. THE MECHANICS OF COMPULSORY INSURANCE

The selection of methods by which the minimum compulsory insurance for paralegals is obtained will have to be examined in detail after the policy decisions with respect to the regulatory system have been made.

The technical obstacles to "group insurance" can be overcome either by:

1. making the group at least partly liable for the defaults of its members; or

2. deeming the group to have the capacity to insure members.

Two aspects of insurance ought to be considered:

1. the independent role of the regulator;

2. immunizing the users of paralegal services from the default by practitioners with respect to their insurance policies.

Insurance principles and practices make it very difficult to keep the insurer and insured at arm's length in relation to claims by third parties. Regulation prompted by protection of the public can be less than optimally

effective if insurance mechanisms turn the regulator's role into that of a co-defendant.

It is unrealistic to think that the role of the Law Society of Upper Canada with respect to lawyers' insurance could be undertaken in the near future by an equivalent body on behalf of paralegals.

Depending on financial considerations, the regulator should either be kept neutral in matters of claims by the public or be privy to the insurance policies solely to claim on behalf of the complainant.

The protection afforded to third parties by liability insurance, by contrast with third party auto insurance, is indirect. The insurer is entitled to raise any defence against the judgment creditor available to that insurer against its own insured, which in our case would be the paralegal. The doctrine of utmost good faith governing insurance contracts, technical descriptions of insured terms, and the rather unique treatment of exclusionary clauses, makes these defences quite substantial.

One can circumvent this result by:

1. a change in legislation bringing the plaintiff's position closer to that of an injured victim in an auto accident; or

2. a policy endorsement similar in nature to that for mortgagees in policies of fire insurance. Either the clients or the paralegal regulator can be made privy to the policy, but independently of the insured paralegal.

IX. CONCLUSIONS

1. There is little likelihood that all risks associated with dealing with a paralegal can be insured.

2. The field should be segregated into groups so that those engaged in high risk/high value activities can be compelled to be fully insured.

3. No participation in real estate transactions should be allowed without insurance against negligence and fraud.

4. Insurance at a lower policy limit must be carried by paralegals engaged in personal property searches and registrations.

5. Fidelity insurance of $5,000.00 for all paralegals should be ordered.

6. Compulsory insurance should indemnify the victim irrespective of the rights of the insurance company vis-à-vis its client.

ECONOMIC ISSUES RELATING TO THE POSSIBLE INTRODUCTION OF INDEPENDENT PARALEGALS IN ONTARIO

by David Stager

I. INTRODUCTION

Because the provision of legal services by non-lawyers for a fee is generally illegal in Ontario and in other similar jurisdictions, there is very little empirical data on which to base this analysis. This paper is theoretical and speculative and based upon a number of assumptions, some of the most important of which are these:

1. The quality of legal service in any economy is reduced when members of the public rely on unlicensed practitioners or perform the service themselves.

2. Licensing, while protecting the public, increases the price of the service.

3. Liability insurance increases the cost of the service while improving public protection. While there are some routine tasks that could be undertaken by paralegals, if they should fail to recognize or respond inappropriately to a typical situation, the client's interest could be harmed, and the client would have no recourse. The key issue here is the potential frequency of such errors.

4. Licensing protects incompetent practitioners from competition.

The question is whether or not it might be possible to obtain at low price good quality in the delivery of legal services where those services are of a routine, standard nature.

1) The Economic Framework of Analysis

The economic framework of this analysis is the marketplace with its basic dimensions of supply, demand, and price. There are economic implications to issues such as "access to justice," "unmet needs for legal services," and "deregulation". While there may be potential economic advantages to allowing independent paralegals to provide services, several economic issues also arise:

- Admissions criteria affect the cost, number and quality of the paralegal service;
- Professional liability insurance and other public protection measures influence the cost;
- The character and degree of allowed competition also affect the cost.

2) The Number of Paralegals

Nothing is known with certainty about the total number of paralegals in Ontario — whether legally or illegally employed — or about their distribution according to age, gender, formal education and training, place and type of work, or incomes. The ratio of supervised paralegals to lawyers may now be about 1:5.

II. SERVICES OF INDEPENDENT PARALEGALS

- Authorized Practices by Non-lawyers: Particular individuals and groups have been permitted to provide specific legal services: for example, insurance claims adjusters, real estate agents, accountants, engineers, and so on.

- Standardized Services: "[A]rguments supporting the introduction of independent paralegals rest almost exclusively on the assumption that certain legal services can be standardized, thereby minimizing any hazards for the clients."

"In contrast to the common view, standard or routine services are shown NOT to depend on professional judgment or legal experience and reasoning." The following criteria (proposed by Engel, 1977) are indicative of standardized service:

- fixed-fees, implying a certainty about the complexity and extent of the work to be done;

- substantial delegation by lawyers to supervised paralegals;

- standard legal forms and routine checklists;

- standard-form documents produced by computer technology;

- work already done by non-lawyers such as, for example, real estate agents.

Applying these criteria suggests that uncontested divorces, simple wills, tax returns, probate and real estate matters, uncontested adoptions,

simple personal bankruptcies, collections, name changes, and simple incorporations are all sufficiently standardized to promote efficiency and lower costs. In the balance of this paper, the term "legal services" refers to this sort of standardized service.

Quality of Service: "The vast majority of prosecuted cases of unauthorized practice have been brought by the bar and have been instigated not as a result of injury to individuals, but as a consequence of investigations by bar committees".

Since causes of poor service can be complex, any assessment procedure will also be complex. One solution is to routinely inspect those areas giving rise to the majority of complaints and insurance claims.

Externalities Associated with Legal Services: These third-party effects must be identified and assessed.

III. THE DEMAND FOR PARALEGAL SERVICES

The demand varies with the price of the service, consumer income, availability of comparable competing service, tastes and preferences of the consumer.

Demand for Lawyers' Services: There is very little data on the quantity of services actually delivered by lawyers; therefore, it is not possible to quantify that part that could be done by paralegals. There is also the question of how much new work would be done by paralegals.

Determinants of Demand: Generally demand varies with price of service, consumer income, and availability of competing service. The

demand for legal services is not likely to respond to a change in price charged because there is little possibility of a substitute service, and the cost to the consumer is in fact a small budget item. In contrast, studies show that the demand for legal services would likely rise as the consumer income rises since circumstances requiring legal services are often related to income levels.

Public Attitudes Toward Lawyers and Legal Problems: The most common criticism is that fees are too high. Potential clients look for timely service, clear fee structure and accessibility in choosing a lawyer. Only then do they consider specific expertise. Further, clients classify problems as legal, social or political, and only seek a lawyer's assistance for problems they see as legal.

Information Concerning Legal Services: The public lacks information on quality and price, as well as the definition of a legal problem. This informational inadequacy is greatest among individuals and small businesses in metropolitan areas. Therefore, this sector may represent the greatest potential for independent paralegals. Since legal services are used less frequently than other personal services, information is generally less available, especially through experience or word-of-mouth. The LSUC has responded with Dial-A-Law and the Lawyer Referral Service.

"With the restrictions on advertising being eased, the question becomes one of determining the most advantageous form and content for advertising....The economic significance of advertising can be ambiguous. Its effects depend on whether advertising is meant to be informative or persuasive....Informational advertising improves competitiveness of

markets....If persuasive marketing is successful, the market is less competitive, and the result is higher price, lower quantities, and less efficient production." On balance, it is likely that the total demand for legal services will increase significantly, but the distribution across all suppliers will depend on many factors.

Access to Justice and Unmet Legal Needs: "Institutional policies determine the AVAILABILITY of legal services, while personal characteristics determine the MOTIVATION to utilize these services." Availability depends on physical availability, cost, information about alternative sources, and the nature of the legal problems. Motivation depends on age, gender, ethnicity, religion, education, occupation and income. Finally, the quality and timeliness of the legal services and the court system must be considered.

IV. THE SUPPLY OF PARALEGAL SERVICES

The quantity of service available will depend on the prevailing price chargeable, which in turn will depend on the cost of paralegal training, the technology used to produce the services, and the amount a paralegal could earn in the best alternative employment.

Sources of Supply of Paralegals: Because supervised paralegals experience several problems, including limited opportunity to advance, repetitive work, and lack of professional respect, many of them would move to independent practice. In the long term, most paralegals would come from the training programs established for that purpose.

Advertising: Advertising influences the supply side of the market because its cost can only be borne by large established firms. If advertising

succeeds in increasing the total volume of work, it may produce efficiencies and thus lower costs. An increase in the volume of routine services allows standardization and permits delegation to supervised paralegals. A high ratio of paralegals to lawyers permits cost reductions.

Corporate Giants as Future Suppliers: "Large multi-service organizations may be able to include legal services as part of their integrated packages of service for a wide range of clients."

V. THE PRICING OF PARALEGAL SERVICES

Approaches to Fee-setting: From the client's point of view, the only issue is: Is there an incentive to maintain quality of service, while providing a larger quantity of services at a lower price? There are several methods:

1) *Fee Schedules* — These can be established by legislation and regulation and are used by legal aid and prepaid plans. They promote efficiency in the firm, but may not reflect the actual work done.

2) *Hourly rate* — This promotes inefficiency, and reflects the experience of the individual lawyer, not the work done.

3) *Contingent Fees* — The contingent fee permits a person who cannot afford legal services to pursue a meritorious claim. The basic criticisms are that contingent fees encourage frivolous litigation and give the lawyer a commercial rather than professional interest in the outcome.

Factors in Fee Determination: The LSUC lists the factors in the rules of conduct. Firms sometimes charge what the traffic will bear in an attempt to assess the value of the service to the client.

Would Fees for Legal Services be Lower?: The market for legal services is difficult to assess since it is still responding to the record increase in the number of lawyers in the 1970's and the fact that since 1976 professional services are included in the *Competition Act*. Some factors point to higher fees:

- training requirements would reduce the number of entrants;
- premiums for professional liability insurance would drive up the cost of services;
- demand for paralegal services would increase as public awareness and confidence grew.

Other factors point to lower fees:

- the supply of services would increase;
- advertising would encourage competitive fee-setting;
- increased demand could result in economies of scale.

"Throughout the literature...there is a notion that legal services could be provided at a lower price to the public if stronger competitive forces were allowed to prevail." Lower competitive fees would be brought about by:

1) *Removal of price discrimination:* Better informed clients would eliminate price discrimination.

2) *Increased supply*: Because the demand is relatively inelastic, the increased supply would likely result in a significant reduction in fees. Suppliers' aggregate earnings would also decline. This analysis should include the public cost of paralegal education in increasing the supply. Thus, the present value of the net benefits may be smaller.

3) *Economies of scale:* These may not be as a result of the introduction of paralegals, but rather through the concentration of routine work in franchised or storefront law firms.

VI. CONCLUSIONS

Since there is no basis for comparison, any conclusions are highly speculative. Some observations and likely outcomes of the introduction of independent paralegals in Ontario are:

- There are certain legal services that are routine and standard and can be provided by trained independent paralegals.

- Many services which are secondary in nature (probate, conveyancing, etc.) fall into this category. Because of their secondary nature, the demand would not be affected by price reduction.

- The supply of paralegals would come from currently supervised

paralegals. The future supply will depend on the cost of education and the potential earnings for graduates.

"The potential impact of the introduction of independent paralegals would depend not only on the specific services that were permitted and how restrictive were the licensing/ certification arrangements, but especially on the effectiveness of information and advertising programs concerning the nature of legal needs and the services available to meet those needs."

THE CONVEYANCING OF REAL PROPERTY BY INDEPENDENT PARALEGALS

by John D. Wilson

I. INTRODUCTION

This paper will consider the ramifications of changing the present system to permit independent paralegals to convey real property.

Before property can be transferred, an opinion on title must be given and only a member of the legal profession is competent to provide such opinion; therefore, conveyancing of real property in Ontario is a monopoly.

Issues to be Considered:

1. Whether unsupervised non-lawyers will be able to adequately search title, provide an opinion and close a transaction.

2. Assuming that a paralegal can do real estate transactions, the question of educating and regulating paralegal conveyancing.

Conclusions:

1. Conveyancing by paralegals is viable so long as safeguards are put in place.

2. A regulatory system will be required which includes licensing, mandatory insurance and ongoing supervision.

3. Not all real estate transactions should be open to paralegals.

II. THE LAND REGISTRATION SYSTEMS

In Ontario there are two land registration systems which can provide a method for determining whether there are extant prior interests.

1) The Registry System

Prior registration of an interest provides constructive notice of that interest to all subsequent purchasers. Once good title has been found, the solicitor then notes all the intervening interests which could affect the property and thereby the vendor's right to pass good title. The solicitor must therefore insure that prior transfers were legally done and that mortgages or liens have been discharged by checking the actual documents filed in the Registry office. Once the solicitor is confident that good title can be passed, she or he will give an opinion to that effect and the transaction can be closed.

2) The Land Titles System

A less complicated system, Land Titles provides that when land is brought into the system prior defects are cured.

Once a transfer of land is registered, then, barring fraud, it is presumed that the transfer is valid.

Unlike in the Registry system, searching solicitors need not go to the original documents but can rely on their preliminary searches.

Registrations are checked by the Master of Titles to insure compliance with the *Land Titles Act.* Under the Registry system there is no review of the documents being filed; therefore, the documents being filed and the documents themselves must be checked for accuracy and validity.

Land Titles is the dominant system only in Northern Ontario.

3) Conclusion

From a conveyancer's point of view, the Land Title system is the superior system: the risk of error is lowered and the chance of a malpractice action reduced. The entire province has not adopted this system because of the cost factor.

III. THE MECHANICS OF A CONVEYANCE

In the normal course of residential transactions, it is only after the two preliminary steps of the "Agreement of Purchase and Sale" and "Financing" have been completed that a solicitor will be retained. In residential sales, reliance on lawyers for negotiating an "Agreement of Purchase and Sale" is rare. It is more likely that a lawyer would be used for larger commercial deals.

While an "Agreement of Purchase and Sale" is usually just a conditional contract, it gives rise to certain obligations in equity. But there is always a possibility that there will be some problem with the property that requires the early negotiating assistance of a lawyer.

In residential real estate it is not common for legal representatives to be involved in the actual financing negotiations. Depending on the complexity, a lawyer may be involved in a commercial deal to negotiate the mortgage terms. The principal function of the purchaser's solicitor is to give an opinion that good title can be passed and to close the deal. The vendor's solicitor must ensure that the financing is in place before possession is ceded.

While the vast majority of residential transactions are likely to be straightforward, there is always the chance of a prior interest which was validly registered and for some reason was missed or thought to be discharged.

1) Sale of Business with Real Assets

If a lawyer is retained to deal with such enactments as

- the *Personal Property Security Act*
- the *Bulk Sales Act*
- the Ontario *Business Corporations Act, 1982*
- the *Securities Act*

it is unlikely that a paralegal would be hired to do the conveyance.

2) Sale of Business with Leaseholds

The vendor may have locked-in tenants at rents unattractive to the purchaser or the terms of lease may create problems. The treatment of leaseholds will often demand the involvement of lawyers.

3) Speculative Purchases

It is common for a lawyer to be involved at a relatively early stage in speculative purchases of commercial properties. Since development or redevelopment is often an objective of the speculator, a lawyer's opinion of such changes being approved will often be required.

IV. PARALEGALS AS CONVEYANCERS

Paralegals could do certain types of transactions without the supervision of a solicitor. There are other transactions which require the interventions of a solicitor.

1) Residential Transactions

A paralegal could assume responsibility for simple conveyances. However, if certain matters arise to complicate the transfer, then the paralegal would be required to retain a solicitor or pass the file on to one.

EXCEPTIONS THAT SHOULD LEAD TO THE INVOLVEMENT OF A SOLICITOR

a) Gaps in the Transfer History

A gap creates a suspicion that there is a defect in title and that someone in the future may claim an interest.

When an apparent defect cannot be cured, the transaction may be voided since the purchaser cannot be assured good title.

Corporate ownership causes particular problems in terms of gaps.

Gaps are potentially serious problems that may be solved in the requisition process and if not the services of a solicitor may be required.

b) Lot Misdescriptions

Occasionally a search reveals that a lot is improperly described either in the Abstract Book or on the deed.

For the purchaser, misdescription has potentially serious consequences, such as:

- financing problems

- adverse possession
- refusal to close the deal.

One method of rectifying a misdescription is a Quit Claim Deed. When there is no serious dispute about the Quit Claim, there is no reason why a trained paralegal could not conduct the negotiations and register the deed. There is no *prima facie* reason that a paralegal could not conduct complex negotiations.

A skilled paralegal could draft a simple deed to correct a lot misdescription. Many deeds are straightforward and often are copied directly from precedents.

Misdescriptions, like gaps, may be simple or difficult to cure depending upon the circumstances. It is not possible to define a threshold under which a paralegal can operate without the involvement of a solicitor. The solution is for the conveying paralegal to be taught to recognize situations where the advice of a solicitor should be sought.

c) Easements

Easements are the rights of one land owner in the property of another. There is a wide variety of easements. Since they arise by contract or usage, there is virtually no legal limit to what may amount to an easement.

In regard to easements it is again impossible to define a standard for the involvement of a paralegal. Some easements present no real derogation of the owner's rights.

In terms of practice, where an easement appears on a property the conveyancer should have a positive duty to disclose the details to the purchaser. If the purchaser acknowledges the easement and indicates that she or he has no objection, there is no reason why a paralegal could not then close the deal. However, when the purchaser indicates concern over the easement, the involvement of a lawyer will probably be required.

There are a number of ways to defeat an easement:

1) One requirement of an easement is that the dominant tenement benefit from the right. The benefit must run directly to the land and may not be merely personal to the owner. When a benefit has ceased to exist, an application may be taken to expunge the easement. Under current legislation such applications require a lawyer's involvement.

2) Propinquity is another method for defeating an easement. This doctrine demands that the dominant tenement be close enough to the servient tenement to realize a true benefit. The involvement of a solicitor is required under existing legislation.

3) Technically another way to challenge an easement is to initiate an action in trespass. This is an offensive manoeuvre which forces the defendant to prove the validity of their right to pass. Under present legislation a court action is required and thus a paralegal would not be competent to appear.

There are instances when easements create no real conveyancing problem. The purchaser should be made aware of the interest and if no

objection is taken then there should be no difficulty with a paralegal closing the transaction. However, where the purchaser does object, then it may be necessary to retain a lawyer.

d) Liens

There is an extremely wide range of liens which can attach to real property. A lien normally arises when the owner of property has not discharged a debt and the security for the debt can attach to the land.

For the most part, liens do not create an overwhelming problem in conveyancing. If the bill is paid prior to the closing or if the purchaser negotiates for an abatement of the purchase price and pays off the lien, then a paralegal can act on these matters.

Because of the possibility of litigation when a lien is to be challenged a solicitor will have to act.

The existence of an execution indicates that judgment has been given against the owner of property and that the judgment remains unpaid. In the vast majority of cases where there is an execution the deal will not close and a paralegal should be able to get involved. But in the rare situation when an attempt is made to save the transaction, due to the complexity involved a solicitor should be consulted.

In the extremely rare situation, where a purchaser seeks to challenge a judgment against a vendor, the services of a lawyer would be required.

Another problem which arises in conveyancing is the certificate of pending litigation. The existence of one normally prevents the closing of the

transaction. If the transaction is voided due to the existence of a certificate, a properly trained paralegal should be able to be involved.

If the purchaser requires advice about the nature of the litigation giving rise to the certificate, the paralegal should be required to refer the matter to a solicitor. Rule 42.02 of the Rules of Civil Procedure allows for the discharge of a certificate by motion to the court. Thus, the retention of a solicitor is required.

e) Tenancy and Family Law

Tenancies arise when more than one person possesses an interest in land.

a) Joint tenancy — exists when there is a right of survivorship and the so-called "four unities" exist.

b) Tenancy in common — exists when the parties to the tenancy hold a distinct share of the property but it has not yet been divided among them. There is no right of survivorship and only the unity of possession is required.

Tenancies are not generally problematical to the conveyancer, though there are some pitfalls. For example, a tenant cannot convey other than his/her own interest without the consent of the other joint owners. If consent occurs a paralegal should be able to complete the transaction. But it is not uncommon for tenancies to result in litigation to determine the nature of the possessory interests or the validity of such interests. When litigation is required, a lawyer will have to be retained.

Family law has created a situation somewhat similar to tenancies. At common-law, a wife has a right to dower: a one-third life interest in any land owned by her husband. The *Family Law Act* abolished future dower, but it retained dower rights which were vested before March 31, 1978. Thus, some attention must still be paid to dower when doing conveyances. A trained paralegal should be able to handle these eventualities. Occasionally dower may lead to litigation and so require a lawyer.

The *Family Law Act* now creates a presumption that both parties to a marriage possess an equal right to marital property. Thus when land is held in the name of only one spouse, there can be no conveyance without the permission of the non-titled spouse. If there are problems with consent a lawyer will be required.

f) Leases

A lease is an arrangement giving a right to possession of property for a given term or at will. This section concentrates on residential leases.

In Ontario it is extremely difficult to terminate a lease except in particular circumstances. Obtaining an order for termination is not easy. Recently the courts have shown a strong bias towards maintaining leaseholds.

In doing a conveyance of property which is subject to a leasehold the purchaser may require advice about the legal nature of the lease and the extent of government regulation. Upon a first reading, the *Landlord and Tenant Act* and the *Residential Tenancies Act* may appear to be quite complicated. They are not in practice. Presently, many landlord and tenant disputes are handled by law students, agents, clinics and supervised paralegals.

The key point is the competence of a paralegal to provide adequate advice to the prospective purchaser of property subject to leasehold. A properly trained paralegal should be able to do this.

2) Commercial Transactions

A lawyer is likely to become involved at an earlier stage in a commercial than in a residential transaction. Commercial transactions may require the services of a solicitor for a number of reasons such as *P.P.S.A.* searches, filings under the *Bulk Sales Act* and compliance with the Ontario *Business Corporations Act, 1982*.

However, the potential complexity of commercial transactions should not disentitle paralegals from operating in this field. The entire area of commercial transaction should not be exempted from paralegals.

V. SPECIFIC CONCERNS

1) Education

The success of the system for conveyancing depends on the ability of the paralegal to identify situations where the involvement of a lawyer will be required.

a) Academic Qualification

A two-year community college program is recommended, with mandatory courses in Property, Torts, Real Estate, Landlord and Tenant and Judicial Review in first year. The second year should include courses in Evidence, Ethics, Statutory Interpretation and a practicum on searching titles.

Upon completion of the two-year program, students should be required to "article" for six months with a lawyer or qualified paralegal. A co-operative program could dispense with the requirement to article.

At the end of the articling period the students should be required to pass a comprehensive examination.

b) Practical Qualification

As an alternative, those paralegals already long employed or those entrants who choose to work for a law firm rather than opt for the academic route should be given the practical alternative. Night or correspondence courses should be made available in Property, Torts, Real Estate, Ethics and Statutory Interpretation. Upon successful completion of the courses, practicum students would be able to write a comprehensive examination and become licensed conveyors. They would not have to article beyond the experience they already have.

A grandparenting provision should be implemented to permit persons who have practised as real estate conveyancers for at least four years to merely write the comprehensive examinations. Should they fail, then successful completion of the courses and a second writing of the comprehensive examination would be required.

2) Licensing

With respect to real estate, the licensing authority should be active rather than passive. The maintenance of integrity will require the establishment of a code of conduct and an administrative mechanism for breach of the code.

3) Insurance

If the Task Force recommends that paralegals be allowed to do real estate transactions, they must also be required to carry adequate insurance.

While most real estate transactions are routine, mistakes do occur. Anecdotal evidence suggests that errors in conveyancing are the most common source of legal malpractice claims, but the relative value of claim in this area tends to be quite low. Should paralegals be permitted to engage in real estate conveyancing, they should also be required to purchase sufficient insurance.

Paralegal insurance should be organized in the same manner as that of the Law Society of Upper Canada. The paralegal should be required to purchase his or her own insurance against negligent conveyancing. There should also be provisions for a compensation fund along the lines of that presently operated by the Law Society.

An alternative method would be to adopt the American model of title insurance. In this model, the purchaser of property rather than the lawyer arranges for insurance. This reduces the cost of insurance.

It is theoretically possible that the premiums demanded of paralegals might effectively price them out of the market.

4) Trust funds

Trust funds are important in real estate conveyancing. Paralegals should be subject to the same degree of regulation of trust account management as lawyers. The public interest demands that whenever monies are deposited

with a third party there should be supervision over the handling of those funds. It would be unfair to require lawyers to comply with a regulatory scheme while their competitors have no such obligation.

There is no evidence to suggest that paralegals will abuse trust funds any more or less than members of the Bar.

Paralegals engaged in real estate practice should be required to enter into an arrangement with a trust company to handle the deposits of mortgage funds and the purchase price. The trust company would then deal with the necessary transfers without funds being paid directly to the paralegal. Trust companies are qualified to deal with these transfers and are extensively regulated by the government.

VI. THE ECONOMICS OF CONVEYANCING BY PARALEGALS

At the present time, lawyers possess a monopoly over real estate transactions. This monopoly may lead to inefficient pricing.

To speak of the Bar as being a monopoly is somewhat simplistic. The Law Society of Upper Canada does have a monopoly over licensing, discipline and standards of competence and integrity. The exercise of these monopolistic powers is immune under the *Competition Act* itself so long as they are reasonably necessary for the protection of the public and what is known as the state action doctrine; when power is derived from Parliament or a Legislature then the *Competition Act* does not apply.

The Benchers of the Law Society no longer maintain a fee schedule and have indicated that they will not countenance binding schedules entered into by any county law association. As well, advertising regulations for lawyers have been liberalized.

Lawyers possess the means through county law associations to maintain agreed upon price levels via "recommended" fee schedules. Common thinking is that so long as there is no binding aspect to the schedule, the *Competition Act* is not violated.

The central question is whether the entry of paralegals would result in a lowering of price to more efficient levels. Hypothetically, an increase in supply should result in a depression in price. The entry of paralegals into the conveyancing business will result in a lowering of price only if the cost of the service is less than the present fees charged by lawyers.

It could be asserted that the service by paralegals would be cheaper since the expense of the supervising lawyer would be saved. However, the costs could also prove to be higher. Given their lack of formal training, paralegals may take longer to explore problems, thus increasing costs.

There is no evidence of a lack of access to real estate lawyers. Prices can only be lowered if paralegals can provide real estate services at a lower cost than lawyers.

APPENDIX G

STATUTES ALLOWING COURT/ TRIBUNAL APPEARANCES BY AGENTS

1. *Highway-Traffic Act,* R.S.O. 1980, c.198, - as permitted by s.51(1) of the *Provincial Offences Act,* R.S.O. 1980, c. 400.

2. *Landlord and Tenant Act,* R.S.O. 1980, c. 232, s.118(1). (residential tenancies)

3. *Courts of Justice Act,* 1984 (Ont.), c. 11, s.79 [Provincial Court (Civil Division)]. (Small Claims)

4. *Construction Lien Act,* 1983 (Ont.), c. 6, s.69(5).

5. *Coroners Act,* R.S.O. 1980, c. 93, s.41(2). (coroners' inquests)

6. *Statutory Powers Procedure Act,* R.S.O. 1980, c. 484, s.10(a) and s.23(3). (appearances before administrative tribunals)

- With the exception of the *Statutory Powers Procedure Act,* the above-named statutes permit the employment of agents only in relatively minor matters.

- The above-named statutes except the *Construction Lien Act, 1983* and the *Coroners Act* contain a provision similar to s.51(3) of the *Provincial Offences Act,* empowering the court or tribunal to bar any agent who is found not competent to represent or advise the person for whom the agent appears or who does not understand and comply with the duties and responsibilities of an agent.

7. *Crown Attorney's Act,* R.S.O. 1980, c. 107, s.7, provides for the appointment of provincial prosecutors who are not members of the Bar.

8. *The Police Act,* R.S.O. 1980, c. 381, s.57, enables police officers to act as prosecutors. In this capacity, the officers are considered agents under s.1(h) of the *Provincial Offences Act.*

9. Law students, who have completed one year of law school, may appear on some matters handled by Student Legal Aid Societies: R.R.O. 1980, Reg. 575, s.80, authorized under the *Legal Aid Act,* R.S.O. 1980, c. 234.

10. By Para.12 of the Rules of the Law Society made pursuant to s.62(1) of the *Law Society Act,* R.S.O. 1980, c. 233, articled students-at-law are permitted to appear in various proceedings.

11. Rule 20 of the Law Society's *Rules of Professional Conduct* permits delegation of many tasks by lawyers to employees who are not lawyers or articled students.

12. *Criminal Code,* R.S.C. 1985, c. C-45, an accused may be represented before the summary conviction court by an agent: see, for example,

- s.800(2) - appearance by counsel or agent
- s.802(2) - examination by counsel or agent
- an accused corporation shall appear by counsel or agent:

see ss. 556(1) and 620.

13. Rule 15.01(2) of the *Rules of Civil Procedure of the Supreme and District Courts* contemplates either court giving a party to a proceeding that is a corporation leave to be represented by an agent.

14. Rule 9.4 of the *Rules of the Provincial Court (Family Division)* contemplates a party to a proceeding being given permission to be represented by an agent. A similar provision appears in the *Rules of the Unified Family Court*.

NOTE:

Some of these statutes provide the court or tribunal with the power to exclude an agent considered to be incompetent. However, other statutes are

silent on the power of courts to exclude agents. For example, there is no *express* power to exclude incompetent agents from the following courts:

- Provincial Court (Family Division);
- Unified Family Court;
- Supreme Court of Ontario construction lien claims up to $3,000.00;
- Supreme and District Court of Ontario actions where the court has given leave for a corporation to be represented by an agent.

APPENDIX H

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